



1 APPEARANCES CONTINUED:

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3 BY: KATHARINE MOWERY, ESQ.

4 -and-

5 PAUL HASTINGS  
6 BY: JOSEPH PALYS, ESQ.  
7 BY: DANIEL ZEILBERGER, ESQ.  
8 BY: NAVEEN MODI, ESQ.  
9 BY: SCOTT PEACHMAN, ESQ.

10 On behalf of Defendants

1 THE COURT: Good afternoon.

2 Please be seated. Let's start with the  
3 introductions of counsel for the record. For  
4 Liqwd and Olaplex?

5 MR. TIGAN: Good morning, Your  
6 Honor. Jeremy Tigan with Morris Nichols on  
7 behalf of the Plaintiffs. I'm joined by my  
8 co-counsel today Joe Paunovich and Matthew  
9 Blackburn.

10 MR. PAUNOVICH: Good morning, Your  
11 Honor.

12 MR. BLACKBURN: Good morning, Your  
13 Honor.

14 MR. TIGAN: And we also have our  
15 client representative here Tiffany Walden.

16 THE COURT: Very good. Welcome.  
17 And for L'Oreal?

18 MS. MOWERY: Good morning, Your  
19 Honor.

20 THE COURT: Good morning,  
21 Ms. Mowery.

22 MS. MOWERY: Kate Mowery on behalf  
23 of the Defendants from Richards, Layton &  
24 Finger. And I have my colleagues from Paul

1 Hastings here, Joe Palys, Naveen Modi, Daniel  
2 Zeilberger and Scott Peachman.

3 MR. PALYS: Good morning, Your  
4 Honor.

5 MR. MODI: Good morning, Your  
6 Honor.

7 MR. ZEILBERGER: Good morning,  
8 Your Honor.

9 THE COURT: Good morning.

10 MS. MOWERY: And at this time if  
11 Your Honor would like, I can pass up the slides  
12 that we're going to use so you have them.

13 THE COURT: That will be  
14 appropriate. Thank you. And while Ms. Mowery  
15 is doing that, if the Plaintiffs would like to  
16 do it as well. Just a note for both sides, if  
17 you also have available to you a copy of the  
18 Federal Circuit's decision on the appeal of the  
19 denial of the preliminary injunction, that may  
20 be handy as we go along on some terms.

21 And then if different counsel from  
22 each side are going to handle the arguments,  
23 then I would ask that you reintroduce yourself  
24 for the record so that we have a clear record of

1 who is arguing on the transcript. Thank you for  
2 the letter of November 2 analyzing how we're  
3 going to divide the time and who will begin with  
4 each term.

5 I'm ready to get started and I  
6 believe the Plaintiffs are presenting arguments  
7 first.

8 MR. PAUNOVICH: Thank you, Your  
9 Honor. Good morning. Joe Paunovich on behalf  
10 of the Plaintiffs. Today with me as well will  
11 be my colleague Mr. Blackburn. He will be  
12 presenting for a portion of the hearing as well.

13 THE COURT: Very well.

14 MR. PAUNOVICH: Your Honor, today  
15 we want to start with a very brief technology  
16 tutorial that will provide some context and  
17 relevancy for the claims that are in dispute. I  
18 know that Your Honor is very familiar with the  
19 case so it's not our intention to deep-dive into  
20 this but to give some context for the terms.

21 THE COURT: Very well.

22 MR. PAUNOVICH: As Your Honor  
23 knows, the asserted patents, the '419 and the  
24 '954 patents are directed to a method for

1 bleaching, not a product. And the science  
2 behind hair bleaching is very different. As  
3 Your Honor I'm sure is no doubt aware from the  
4 Federal Circuit's ruling in the initial P.I.  
5 proceedings, whereas a coloring process actually  
6 deposits pigment within the hair shaft.

7 A bleaching process actually  
8 removes the color that's in hair. That's the  
9 melanin. It's like the color that's given to  
10 all of our skin. It's the same thing that's in  
11 a hair shaft. And what happens with bleaching  
12 is that melanin is dissolved and oxidized  
13 effectively rendering it colorless in hair. So  
14 that's generally speaking how bleaching works,  
15 and the process is called oxidation.

16 The issue with bleaching and  
17 what's important for us to understand here today  
18 with respect to the disputed terms is that in  
19 order to have a bleaching effect, you have to  
20 get by a protective coating, a surface if you  
21 will, that's on the hair shaft called a cuticle.  
22 So this is that outerset of cells on the hair  
23 shaft that if you look at it from a microscopic  
24 level, it looks almost like scales on a fish.

1 And what it does is when the hair  
2 is not damaged or it hasn't been bleached, it  
3 lays down flat and it acts as a shield  
4 protecting and strengthening the hair shaft. So  
5 in order to bleach, what a person of ordinary  
6 skill in the art understands, and we'll see this  
7 is well supported by the literature, is you have  
8 to have a composition that's capable of lifting  
9 up those scales on the outside of the hair shaft  
10 so it can get inside to the melanin and  
11 ultimately dissolve and render it colorless.

12 If we look at bleaching like it's  
13 claimed, and we'll talk about the ingredients of  
14 a bleaching mixture shortly, and I'm now on  
15 Slide 6 of Plaintiffs' demonstratives, what we  
16 see in bleaching and we'll talk about with  
17 respect to those bleaching terms is that it  
18 requires most importantly a high alkaline pH.

19 Now, pH refers to -- you can have  
20 a neutral pH, water is around 7 and anything  
21 below that is acidic and anything above it would  
22 be basic or alkaline. And what we find and what  
23 the literature tells us and a person of ordinary  
24 skill in the art understands is in order to have

1 an actual bleaching effect, you have to be way  
2 up at around a 9 to 11 pH because it's at that  
3 pH where the ingredients that are in a bleaching  
4 formulation are capable of lifting that cuticle  
5 and getting inside the hair.

6 Although this is a somewhat  
7 cartoonish animation, we tried to illustrate  
8 that. That's the alkaline lifting the cuticle.  
9 The bleach can get inside the cortex of the hair  
10 shaft where it can act to ultimately render that  
11 melanin, the color in the hair, colorless.

12 Now, the other thing about high  
13 alkaline pH and the need for an alkaline agent  
14 in bleach is that it activates the oxidation and  
15 accelerates the oxidation that occurs as it's  
16 illustrated here. So you've got peroxide and  
17 you've also got persulfates. The high alkaline  
18 pH peroxide is activated.

19 It's able to dissociate and  
20 ultimately further trigger the formation of  
21 radicals in the persulfates, and it's these  
22 powerful free radicals, those are the things  
23 that are able to affect this oxidation in the  
24 hair shaft and accomplish the bleaching.



1                   The parties, we have a plain  
2                   meaning proposal on one side and we're proposing  
3                   constructions of it. It's important for  
4                   construction here today so we don't end up with  
5                   what effectively is a self-claim construction  
6                   dispute before our jury where the one side is  
7                   saying, look, here is this prior art, it's a  
8                   bleaching piece of prior art, but in reality  
9                   it's actually an acidic composition so it's not  
10                  actually capable of doing the things, the  
11                  function that's required to accomplish  
12                  bleaching.

13                  And just to hammer that point  
14                  home, what we find and what the literature tells  
15                  us is, and this is Slide 7 of our  
16                  demonstratives, when you have an insufficiently  
17                  high alkaline pH or something below 9, you don't  
18                  get that bleaching effect. The composition  
19                  might try to get into the hair, you can apply  
20                  it, you might leave it there for a very long  
21                  time but it's not going to be able to lift that  
22                  cuticle and render the melanin colorless, and  
23                  the literature spells this out as we look at  
24                  this later today.

1                   Let's turn back to our  
2           Demonstrative 4. So what's in a bleaching  
3           formulation that provides this function.  
4           There's two components. One component is a  
5           bleach powder and the second component is a  
6           developer. The bleach powder requires as we'll  
7           explain later today an alkalizing agent for that  
8           high pH that we just looked at that provides the  
9           required function and the persulfate, one of the  
10          other ingredients that's required as part of the  
11          bleach powder is one of the substance in  
12          addition to the peroxide that forms these  
13          powerful free radicals that accomplishes the  
14          oxidation.

15                   THE COURT: Is there any dispute  
16          with regard to the respective claim  
17          constructions where you said it requires an  
18          alkalizing agent, that's one of the issues we  
19          will be addressing in the claim construction?

20                   MR. PAUNOVICH: That's correct,  
21          Your Honor. In the tutorial, we're just trying  
22          to give some preview of the technology and why  
23          that from our perspective is a required  
24          component of the bleach powder.

1 THE COURT: Understood. I'm just  
2 trying to keep the moving parts clear.

3 MR. PAUNOVICH: Understood. The  
4 second part of the bleaching formulation is the  
5 developer. This is peroxide or hydrogen  
6 peroxide, H<sub>2</sub>O<sub>2</sub>. We'll hear more about this  
7 later today as well. You probably as kids when  
8 you injured your knee when you were younger, the  
9 brown bottle, you pour the liquid substance on  
10 your knee, that's our product --

11 THE COURT: I've got a lot of  
12 personal experience with hair products too.

13 MR. PAUNOVICH: That product is  
14 not stable unless it's stored at an acidic pH 3  
15 or 4. And as I explained earlier, the reason we  
16 require alkalizing agent is to activate that  
17 peroxide to get into form, dissociate and become  
18 a powerful free radical which in turn will help  
19 dissociate persulfates. You need the alkalizing  
20 agent.

21 Now, what that means is that when  
22 you combine the developer with the bleach  
23 powder, it becomes an unstable mixture. It has  
24 a limited shelf, a very limited shelf life. In

1 fact, as we'll see from the evidence, if you mix  
2 these ingredients, the peroxide forms these free  
3 radicals along with persulfate free radicals and  
4 it begins constantly changing.

5 Persons of ordinary skill in the  
6 art in the context of this invention and  
7 certainly just an ordinary practitioner,  
8 stylist, understands when you mix these  
9 ingredients, you use them and discard them when  
10 you're done. It's not something you put on the  
11 shelf. Together this combination which forms  
12 the bleaching formulation that creates the high  
13 alkaline pH condition that can lift that cuticle  
14 and ultimately affect the oxidation for this.

15 Now, we saw earlier just in the  
16 cartoon animation of how that ultimately results  
17 in bleaching, so what's the result. What we  
18 know is that bleaching, and this has long been  
19 known, for many, many years, decades, bleaching  
20 causes damage to the hair. It's just a  
21 practical reality. If you go to a stylist and  
22 you try to bleach your hair too far in one visit  
23 or after multiple repeated visits for bleaching  
24 or coloring for that matter, which would include

1 a bleaching step, you're going to end up with  
2 damage to the hair.

3 Now, on a molecular level there's  
4 all sorts of damage that might occur. Maybe  
5 it's broken bonds, maybe it's surface damage, et  
6 cetera, but you can't see those visibly with the  
7 human eye. What you see and how this presents  
8 is frizz, course hair, the hair becomes brittle,  
9 it becomes dull, it loses some of that sheen and  
10 most importantly, the most problematic of them  
11 is it leads to breakage of hair, almost like a  
12 piece of straw.

13 If you look at hair that's been  
14 bleached way beyond the normal of what you will  
15 see in a salon, you can literally take it in  
16 your hand, it's going to stand straight and snap  
17 it. It's just a problem that exists with this.  
18 So when we're talking about breakage in the  
19 context of this patent, that's what's being  
20 referred to, and we see that identification in  
21 examples that we'll talk about later. It's not  
22 at a molecular level, generic damage that you  
23 can't see, but rather the actual breakage of the  
24 hair fibers. That's what this invention was

1 attempting to solve.

2 So what is our invention? The  
3 invention, as we said earlier, is a method for  
4 bleaching. And what it does is it uses an  
5 active agent. In the case of this particular  
6 patent family, that's our maleic acid or its  
7 salts so that it helps protect, strengthen and  
8 prevent that break. And what we're talking  
9 about when we're referring to the activation,  
10 we're talking about the starting ingredient, the  
11 thing before you do anything else with it,  
12 before you combine it, put it in aqueous  
13 solution of water, before you're combining it  
14 with the bleaching formulation.

15 So in the case of active agents as  
16 maleic acid, it can start as pure nonionic  
17 pre-acid, just pure maleic acid. In the case of  
18 a salt, it can start as any powderized form of  
19 the maleic acid salt. And these ingredients  
20 added to water is what creates that active agent  
21 formulation.

22 Now, as it's applied, as it's  
23 claimed, what you do at that point is you take  
24 that bleaching formulation that's a high pH and

1 provides that high pH of 9 to 11 and you combine  
2 it with the active agent formulation. You mix  
3 those together. You can do it either before you  
4 apply it to the hair, shortly before or you  
5 could conceivably apply one of the mixtures, one  
6 of the formulations to the hair and apply the  
7 other formulations to the hair and in effect  
8 they will be mixed once on the hair. You're  
9 using a brush, you're moving all of these  
10 ingredients around on the hair.

11 Just briefly, the claims talk  
12 about a concentration of what's the  
13 concentration of the active agent in that  
14 mixture. And L'Oreal focuses very closely on  
15 the in the mixture language of the claims. What  
16 we have to keep in mind, and we'll talk about it  
17 here again shortly, is these claims are viewed  
18 through the eyes of a person of ordinary skill  
19 in the art, the context of the spec and the  
20 general knowledge in the art.

21 And what folks understand in this  
22 industry and chemistry generally is that when  
23 you're talking about concentrations, for  
24 example, you're talking about the initial

1 ingredients. So for example, Thanksgiving  
2 gravy. We all know Grandma has a recipe for  
3 Thanksgiving gravy. It's two cups of chicken  
4 stock, a cup of flour, a sprinkle of salt, a  
5 sprinkle of pepper, maybe some drippings. The  
6 list goes on.

7 When you're eating at  
8 Thanksgiving, you say this is great gravy. I  
9 would love to have the recipe. How much chicken  
10 stock do you put it in. Grandma doesn't put a  
11 probe down in there at the table side to assess  
12 let me tell you exactly how much chicken stock  
13 is in here.

14 Now, what she says is there's two  
15 cups of chicken stock in it, a cup of flour and  
16 so forth. But everyone realizes in that gravy  
17 that it may be that you don't actually have  
18 chicken stock anymore in that final combined  
19 mixture. It's been mixed with a bunch of other  
20 things. It's reacted with the drippings, with  
21 the flour and subjected to heat, et cetera. So  
22 this is a commonplace understanding that I don't  
23 want it to be too kitschy analogy, but I think  
24 it's applicable here today and it's certainly



1 applicable in the chemistry context where we see  
2 the great way to the evidence is this is exactly  
3 how analytic chemists look at concentration as  
4 well.

5 So when you're using the  
6 invention, you add this active agent to a  
7 bleaching formulation, you apply it in exactly  
8 the same way as you would a normal bleaching  
9 formulation. It's the same procedure, same  
10 times, et cetera. And what's no better  
11 illustrative of that are some of L'Oreal's own  
12 tutorial videos that they published on the  
13 Internet.

14 We were able to go on YouTube and  
15 find three different videos that L'Oreal has  
16 made and published talking about how, for  
17 example, their accused products are used in a  
18 bleaching treatment or how bleaching treatments  
19 are used in particular -- how you combine the  
20 peroxide and the bleach powder or bleach cream,  
21 if you will, and apply them quickly thereafter.

22 And for the sake of time in this  
23 hearing without boring everyone sitting through  
24 a video, we spliced a couple portions of them

1 just so that you could see the relevant parts of  
2 the technology at issue, but we have included  
3 the cites in the next slide in the event that  
4 the Court would like to view those videos in  
5 their entirety.

6 (Video playing.)

7 MR. PAUNOVICH: This is a tutorial  
8 on bleaching and just demonstrates how even just  
9 a person at home would go about combining the  
10 required ingredients to bleach and applies them  
11 shortly thereafter. And as I mentioned, the  
12 full videos are in the demonstratives that we  
13 provided. That's Demonstrative Slide 12.

14 So turning to the disputed claim  
15 terms and as the parties have proposed,  
16 Plaintiffs would go first on the initial set of  
17 proceedings or are you --

18 MR. PALYS: Yes. Sorry to  
19 interrupt. I thought we had agreed to split the  
20 intro and then --

21 MR. PAUNOVICH: Okay.

22 THE COURT: I will hear from  
23 Defendants.

24 MR. PALYS: Sorry to interrupt,

1 Your Honor.

2 THE COURT: That's all right.

3 MR. PALYS: Good morning, Your  
4 Honor. May it please the Court. My name is  
5 Joseph Palys with Paul Hastings for the  
6 Defendants. So we can start with Slide 2. As  
7 Mr. Paunovich mentioned, Your Honor, it's not  
8 lost on us that you're familiar with the case.  
9 You have been involved with it for a while and  
10 the patents, so I'm going to keep our  
11 introduction and background on the technology  
12 somewhat at a very high level.

13 Obviously, we're going to be  
14 talking about a lot of technical issues and  
15 technical terms and I plan on addressing them  
16 then when we get to the disputed terms where  
17 it's relevant. With that in mind, I'll go to  
18 Slide 3. We'll start with a very brief  
19 understanding. Obviously, we're here to talk  
20 about the asserted patents. That's the '419  
21 patent and the '954 patent.

22 A couple of points here regarding  
23 the patents. You heard Olaplex's counsel talk  
24 about what their invention is and what it's

1 related to bleaching, and these patents describe  
2 formulations and processes for treating what  
3 they call keratin in hair, in nails and skin  
4 relating to coloring and permanent wave  
5 treatments.

6 The specifications provide  
7 examples. They provide discussions of different  
8 compounds, things like active agents. We'll  
9 talk about that today. The one point I want to  
10 make and just make sure it's not lost, I'm sure  
11 you're aware the '954 is a continuation of the  
12 '419, meaning it shares the specification. It  
13 comes from the same subject matter. When it  
14 uses terms, it all relates.

15 So Slide 4. Now, while the  
16 specifications describe many things, what is  
17 clear, what is in the claims, they're directed  
18 to a method of bleaching hair. On the left you  
19 see the '419 patent. This is on Slide 4, and on  
20 the right you see claim 1 of the '954 patent.  
21 Both are directed to a method of bleaching hair  
22 that is very related. There are some slight  
23 differences that I'll point out just for the  
24 Court for purposes of today.

1 But in general, the '419 patent is  
2 a two-step method. The first method, you're  
3 mixing a formulation comprising an active agent.  
4 You're mixing that with a bleaching formulation  
5 to create a mixture. You heard Olaplex's  
6 counsel kind of give you a graphic about that,  
7 so there should be no dispute. There's a  
8 mixture formed.

9 The claim clearly shows what that  
10 active agent formula is. It's the maleic acid.  
11 That's the structure you see in claim 1.  
12 Alternatively, that can be salts for that. Then  
13 the second step, that's all part of the first  
14 step, is just mixing that together to create the  
15 mixture. And then obviously Step B is apply to  
16 the hair.

17 The rest of these characteristics  
18 like the active agent that I mentioned and the  
19 concentration clearly says what the active agent  
20 and the mixture has to have. Those are  
21 characteristics. In the end, it's a two-step  
22 method. The '954 patent claim 1 is a similar  
23 method. It's just three steps here.

24 One Of the differences it adds is

1 first Step A where you're creating the bleaching  
2 formulation, so now this is where this term  
3 comes in, mixing a bleach powder and a developer  
4 to the bleaching formulation. But  
5 realistically, when you look at the claims  
6 collectively, Your Honor, Step A and Step B,  
7 Step A of the '419 and Step B in the '954,  
8 they're tracking. Slight difference in the '954  
9 patent. It even calls out to form a mixture.

10 Step C of the '954 patent tracks  
11 with Step B of the '419 applying that mixture to  
12 the hair, and then the characteristics about the  
13 activation in that mixture, that tracks in both  
14 claims. So slight differences, but we're really  
15 talking about a very similar method of bleaching  
16 here.

17 It's also important to note, Your  
18 Honor, what these claims do not recite. They  
19 don't recite any level of bleaching. Nothing in  
20 these claims that say you have to have a certain  
21 lift, a certain effect that's caused. It  
22 doesn't say anything about building bonds or  
23 breaking bonds. You heard that in the previous  
24 discussion and set forth in the specification.

1                   It certainly doesn't say anything  
2           about a pH level in these claims. We're looking  
3           at the plain language of the claims in its  
4           entirety. It doesn't talk about a solution.  
5           You heard Olaplex's counsel raise this and show  
6           you a graphic in their introduction. Now, this  
7           is our invention, I believe, he said. And it  
8           showed maleic acid, which I don't know if there  
9           is even a dispute that was the nonionic form.  
10          That is obviously Defendants' position. Plus  
11          water to create the active agent formulation.  
12          There's nothing in that claim, in either one of  
13          those claims that require an aqueous solution.  
14          In fact, we will explain why that is the case  
15          when you look at the full scope of the claims.

16                 So what their invention is what  
17          you see in the claim language and obviously  
18          there are some dependent claims. So what are we  
19          here today to do. Again, I'm going to focus my  
20          tech tutorial or I should say pass it off when  
21          we talk about the disputed terms.

22                 But what we're not here to do  
23          today is really try to discuss Olaplex's  
24          infringement, how they're trying to map the

1 claims. You saw some theatrics a little bit ago  
2 about the video which is not even  
3 contemporaneous. When we're talking about claim  
4 construction, we're talking about the time frame  
5 of 2014 and 2015.

6 We're here to talk about the  
7 intrinsic record. And Defendants believe their  
8 constructions will stay true to that intrinsic  
9 record, and we agree it should be in the context  
10 of what one of ordinary skill in the art should  
11 understand.

12 Defendants provided expert  
13 testimony to support that for purposes of this  
14 claim construction, and Olaplex did not. So  
15 before we dig into the disputed terms, there's  
16 another important aspect that we want to make  
17 sure that is not lost, and that is the '419 and  
18 '954 patent family.

19 We want to make sure that the  
20 evidence that we provided, that the Court  
21 appreciates where do the '419 patent and '954  
22 patent come from. You can see on Slide 5  
23 they're highlighted in yellow, and this is a  
24 rudimentary graphic, if you will. We're trying



1 to explain what Olaplex's patent family is.

2 It starts off at the top, and  
3 that's the U.S. Provisional 61/994,709, and it's  
4 a copy of that in the record at D.I. 462-1  
5 Exhibit AP. That's the provisional application.  
6 Provisional application is submitted to the  
7 Patent Office and you can claim priority on that  
8 to continue what would turn into a normal  
9 application, and that's what you see in gray on  
10 the right.

11 So from there, on May 15, 2015  
12 about a year later from when they submitted its  
13 U.S. provisional, they submitted the application  
14 for the '926 patent. That's U.S. 9,326,926 on  
15 the top right. The '926 patent is D.I. 462-1  
16 Exhibit AO. So that's a parent application when  
17 we're talking about a parent and a child's  
18 continuation like we talked about.

19 So underneath on the right you can  
20 see how the stem of applications that came from  
21 that specification from the '926 application and  
22 from the '709 provisional. The '419 patent came  
23 from that. Later on they filed a continuation.  
24 We got the '954 patent from that. And recently

1 they obtained another patent, the '478. And all  
2 of this is part of the same family.

3           Importantly, we also want to point  
4 out, that's why we highlighted in gray, on the  
5 left side you can see that Olaplex also pursued  
6 many applications overseas. You can see these  
7 national stage applications that stem from PCT  
8 application that they filed on the exact same  
9 day as that '926 application. And that PCT  
10 application published as WO 2015/175986. In our  
11 papers we refer to that as the WO986  
12 application, and that was the recent exhibit  
13 that we --

14           THE COURT: That you fixed.

15           MR. PALYS: Yes, and we apologize  
16 for that, and that is the D.I. 476, that's the  
17 WO986. What is important here is that  
18 application tracks almost virtually identical to  
19 what you see in the 926 application. In fact,  
20 if you turn to Slide 6, Defendants submitted an  
21 Exhibit, D.I. 462-1 Exhibit L to make this  
22 point. And it was a red line between the WO986  
23 application and the 926 application.

24           You can see the exhibit speaks for

1       itself. We just gave some excerpts. Most of  
2       them are minor word changes. Most of the  
3       changes you can see here on the slide were two  
4       general paragraphs that were added at the end of  
5       the application.

6                       So Slide 5. So why is this  
7       important? What happened from that PCT  
8       application, and I'll just refer it as W0986 but  
9       just understand that that's just the published  
10      version of the PCT application. What happened  
11      was Olaplex pursued a number of national  
12      applications. Again, this isn't the full list.  
13      This is just an excerpt. But those national  
14      stage applications all stem from the same  
15      application that shares virtually the same  
16      specification that's in the '926 which gets you  
17      to the '419 and '926.

18                      Why is that important, Your Honor?  
19      Because there's been positions taken from  
20      Olaplex, you can see in the briefing that  
21      they're trying to run away from what they said  
22      in these national stage applications because  
23      they were different or they were directed to a  
24      different invention. But as you can see if you

1 go to Slide 7, not only were the specifications  
2 similar, they pursued claims that were very  
3 similar.

4 At the top, you see a claim from  
5 Canada, claim 10, you can see the same active  
6 agent, maleic acid, alternatively salts, has the  
7 same type of concentration language. Down below  
8 it, Australia, claim 11, a very similar claim.  
9 In fact, if you go to Slide 8 in Israel, they  
10 pursued a claim that was word for word the same  
11 claim as claim 1 of the '954 patent. So any  
12 suggestion to say that these inventions or their  
13 discussions on applications that stem from these  
14 national stage applications have no bearing on  
15 the representations that they made with respect  
16 to the '419 patent and '954 patent, we believe  
17 the evidence is clear that it is.

18 So I'll wrap this up. I will  
19 discuss today why these facts are relevant.  
20 I'll discuss and touch on the technical issues  
21 that we're going to talk about what maleic acid  
22 is and bleaching and all of that. At this time  
23 unless the Court has any questions, I'll yield  
24 the podium to my friend to my left and we'll get

1 started on the disputed terms.

2 THE COURT: Let's get started on  
3 the disputed terms.

4 MR. PALYS: Thank you, Your Honor.

5 THE COURT: Thank you.

6 Mr. Paunovich?

7 MR. PAUNOVICH: Joe Paunovich on  
8 behalf of Plaintiffs, Your Honor. For the  
9 disputed terms, the parties have agreed to  
10 address a series of three terms that are related  
11 together, that being the active agent terms, the  
12 salts thereof terms and the added concentration  
13 terms.

14 As Your Honor may know from the  
15 briefing, that we have a PTAB ruling that gives  
16 us a road map for consideration of these. We're  
17 going to look at some excerpts of it more  
18 specifically, but that key document which is  
19 very helpful to resolving these disputes is  
20 available at D.I. 426 Exhibit 20. It is the  
21 PGR2018-00072737.

22 This was one of the petitions that  
23 L'Oreal had filed against the '954 patent in  
24 particular which was ultimately denied

1 institution by the PTAB. So let's look at a  
2 quick exemplary claim. This was the '419 patent  
3 claim 1 which includes at least a version of  
4 these disputed claim terms that requires a  
5 formulation comprising an active agent where the  
6 active agent has the formula that's illustrated  
7 in the claim or salts thereof and it also  
8 requires the active agent in the mixture at a  
9 particular concentration range spelled out in  
10 the claims.

11 The '954 patent, I don't have an  
12 additional slide on it, is very similar.  
13 Essentially, the main difference is instead of  
14 displaying the illustrated structure formula,  
15 that is, it recites maleic acid and does not  
16 include the or salts thereof language.

17 Now, the parties' dispute with  
18 respect to all three of these terms is very  
19 simple. The question that the Court needs to  
20 answer for each of these terms is whether when  
21 we're talking about the agent, its salts and the  
22 concentration, what a person of ordinary skill  
23 in the art as in Olaplex's view look at the  
24 ingredient before it's being added to the

1 formulation and the mixture to determine whether  
2 or not you actually have used the claimed agent  
3 and look at its concentration relative to the  
4 final mixture like our gravy recipe or would a  
5 person of ordinary skill in the art, as L'Oreal  
6 contends, look at the mixture at some  
7 indeterminate time in the future after  
8 everything is combined, you've cooked your  
9 gravy, and maybe it's before you apply it to the  
10 hair, maybe it's after, determine whether or not  
11 you have a continued presence of that active  
12 agent and whether at that indeterminate time as  
13 a concentration that is within the range  
14 required, so this is our probe in the gravy.

15 For these three terms, we're going  
16 to start with the last of them, the added  
17 concentration term. Because when we go through  
18 this evidence, it's instructive like our gravy  
19 example of how a person of ordinary skill in the  
20 art reads these claims in the context of the  
21 specification and the art generally. And from  
22 that, the waterfall flows very easily to the  
23 construction of the other terms.

24 Now, very briefly, Your Honor may

1 recall this dispute about concentration. This  
2 was a dispute that was raised for the first time  
3 after our first PI proceeding and after our  
4 argument in the Federal Circuit. So prior to  
5 that time, and we'll see some of this evidence,  
6 L'Oreal's experts and submissions to the Patent  
7 Office, they had no question, no confusion about  
8 how you interpret this claim. You look at it as  
9 Olaplex proposes.

10 You look at the starting  
11 ingredient, do you have it or not, and you  
12 assess its concentration relative to the mixture  
13 but not at some time later after it's combined.  
14 And it was only after our early January 2017  
15 argument at the Federal Circuit where everybody  
16 walked out knowing exactly what was going to  
17 happen with the hair coloring term, that we saw  
18 L'Oreal articulate this newfound interpretation  
19 of the claim for the first time. That happened  
20 in the PGR2018-00023 that I mentioned, again  
21 available at D.I. 426, Exhibit 20. So that's  
22 the context for it.

23 I won't spend any time on our  
24 Demonstrative Slide 17. The Court, I'm sure, is



1       aware of what the parties' proposed  
2       constructions are. I'll turn to Demonstrative  
3       Slide 18 which is our road map from the PTAB.  
4       What this is, D.I. 426, Exhibit 20, is a  
5       decision denying institution of review over the  
6       '954 patent.

7               And what we see in that decision  
8       is that the PTAB expressly rejected L'Oreal's  
9       construction. They found that their proposed  
10      construction would be highly unusual examination  
11      of the changing mixture, that probe in the  
12      gravy. And they weren't able to offer examples  
13      then and they can't today offer any examples  
14      within the specification as to how you would  
15      conduct that analysis or frankly how it would  
16      read on any embodiment in the specification.

17             And by contrast, the PTAB said the  
18      patent owner's proposal is consistent with the  
19      '954 patent. This has a common specification  
20      with the '419 so we are on all fours there, and  
21      it's also consistent with the manner that  
22      L'Oreal's experts used to calculate the active  
23      agent concentrations in an earlier post-grant  
24      proceeding. That's referring to the 2017 PGR

1       against the '419 patent where their expert  
2       looking at this claim, attempting to apply the  
3       prior art to it, calculated the concentration in  
4       the exact same way that we're proposing here.

5               This is just not how you do it.  
6       You don't dip a probe into the gravy. If we  
7       look at the specification that the PTAB said was  
8       consistent with this proposed construction, it  
9       follows exactly this methodology that chemists  
10      and common people know of how you assess an  
11      ingredient within a composition. This is not  
12      attorney argument. It's plain and simple math,  
13      so an expert is not needed.

14             This is Example 3, an excerpt of  
15      it, tells us a few simple things. You have an  
16      active agent formulation that has maleic acid,  
17      add concentration of 2 grams in a total 10 gram  
18      solution. With respect to the bleaching  
19      formulation, it says you have 1 ounce of  
20      developer and 1 ounce of powder bleach and that  
21      forms your bleaching formulation or highlighting  
22      formulation as it's sometimes referred to in the  
23      specification.

24             And what you do then is it says

1       you take 9 ml of that active agent formulation  
2       that it just described and you add it to that  
3       bleaching formulation. So we've explained this  
4       in our brief, simple math that no expert is  
5       needed for. You have your starting ingredient,  
6       your chicken stock, your flour, 2 grams of  
7       maleic acid. That's what Example 3 tells us.  
8       It says that's in a total of a 10 gram solution  
9       of water.

10               If we do the simple math, 2  
11       divided by 10 is a 20 percent by weight maleic  
12       acid in the active agent formulation. We look  
13       at the next step that Example 3 talks about, 1  
14       ounce of developer and 1 ounce of bleach powder.  
15       It doesn't matter what those things are  
16       constituted of because 1 ounce is always about  
17       28 grams. That's just a simple metric. It  
18       doesn't matter what it is. An ounce translates  
19       directly to grams.

20               So we have about 28 grams of  
21       developer, 28 grams of bleach powder for a total  
22       of 56 grams of a bleaching formulation. Just to  
23       step back for a moment here, for our active  
24       agent formulations, you're starting with that

1 initial ingredient, a maleic acid. It's  
2 nonionic free acid at that point, pure acid, or  
3 a salt in the case of the '419. Once you add it  
4 to the solution, it's nonionic from that point  
5 forward. That's just a reality of practical  
6 chemistry reality, and that's what our spec  
7 describes.

8 So Step 3, you combine the active  
9 agent formulation with the bleaching  
10 formulation. This again is simple math, doesn't  
11 require an expert. We know that there were 10  
12 grams total of active agent formulation and it's  
13 primarily water, about 80 percent is what  
14 Example 3 tells us. Simple, water is generally  
15 about 1 ml per 1 gram. Attempting to illustrate  
16 it, if it's off by a small amount, it doesn't  
17 affect this analysis here.

18 At the 20 weight percent maleic  
19 acid in an active agent solution, that  
20 translates to about 1.8 grams maleic acid. In  
21 our brief, we said 2 grams just to make the  
22 numbers nice and round but it doesn't affect the  
23 ultimate analysis.

24 So we have 9 grams of active agent

1 formulation combined with 56 grams of bleaching  
2 formulation for a total of 65 grams in the  
3 mixture of Example 3. So what's the  
4 concentration in that ultimate mixture. Well,  
5 again simple math. We've got 1.8 grams of  
6 maleic acid divided by 65 grams of the total  
7 mixture. It's about 3 percent by weight  
8 relative to the overall mixture, exactly within  
9 the claimed range of the claims in both the '419  
10 patent as well as the '954 patent.

11 And at this point just to step  
12 back as well here, when you combine the active  
13 agent formulation which is already going to have  
14 an ionic species of the active agent with the  
15 bleaching formulation, this is like we talked  
16 about in the tutorial. Now, you have a reactive  
17 mixture. It's a high alkaline pH. Things are  
18 changing and they're changing quickly.

19 It's going to also begin reacting  
20 with the active agent formation and converting  
21 it to salt forms. So this is a constantly  
22 changing mixture at that point. Now, L'Oreal  
23 has focused exclusively almost on the language  
24 in the claims in the mixture and they say, well,

1 concentration has to be in the mixture because  
2 that's what the claims say. But what we know  
3 from Phillips, you don't read the claim language  
4 divorced from the patent. You read it in the  
5 context of the specification.

6 A person of ordinary skill in the  
7 art also reads it in light of the general  
8 knowledge in the art. So it's not sufficient to  
9 just read the claim language and stop there and  
10 say, well, it says in the mixture so it's got to  
11 be in the mixture. And if we look at how a  
12 person of ordinary skill in the art actually  
13 does interpret this, what we see is we have  
14 expert testimony of Dr. Borish.

15 This is D.I. 288 at Paragraphs 66  
16 and 67, and he explains that this is what  
17 chemists do, what a person of ordinary skill in  
18 the art does. They assess it like Olaplex's  
19 view of Thanksgiving gravy. You look at the  
20 concentration of the active agent, the weight of  
21 the active agent that is, add it into the active  
22 agent formulation relative to the total weight  
23 of the final mixture.

24 And his opinion on this issue is

1 not surprising because it's consistent with all  
2 of the other evidence other than L'Oreal's  
3 recently hatched interpretation of this claim  
4 term of how people go about interpreting the  
5 concentration terms in these claims.

6 I'm not going to go over them each  
7 individually. Your Honor has the evidence in  
8 the record. We've summarized it here including  
9 the cites on our Demonstrative Slide 24. You  
10 have the patent examiner at D.I. 99-1, Exhibit  
11 R, Page 7 interpreting in relation to the prior  
12 art. The analysis of this concentration term,  
13 very much the same way. When you're analyzing  
14 prior art or infringement, you have to interpret  
15 the claims the same way so we are all on fours  
16 with that.

17 We have L'Oreal's PGR expert from  
18 the 2017 419 PGR petition; D.I. 425, Exhibit A  
19 at the paragraphs that are noted on this  
20 demonstrative, 153 through 154, 156, 159, 237  
21 and 239 interpreting it in exactly the same way.  
22 Now, we have a variety of third-party  
23 submissions which we still strongly believe are  
24 submitted by L'Oreal. They're all available at

1 D.I. 425, Exhibits 5, 6 and 7 where when L'Oreal  
2 or whichever the anonymous third party was, was  
3 telling the Patent Office, look, here is the  
4 prior art. I want to explain how it maps onto  
5 the claims. They interpreted this concentration  
6 term in exactly the same way.

7 THE COURT: Let me ask you to stop  
8 there for a moment. What you haven't indicated  
9 on this slide and maybe it's coming, reconcile  
10 that with how the Fed Circuit interpreted hair  
11 coloring agent. Didn't the Federal Circuit  
12 determine that the mixture recited in claim 1  
13 referred to the combination of the active agent  
14 formulation and the bleaching formulation that's  
15 applied to the hair and doesn't that lend more  
16 support for L'Oreal's argument and not for  
17 Olaplex's argument that you measure the active  
18 agent concentration prior to mixing with the  
19 bleaching formulation?

20 MR. PAUNOVICH: Sure, that's a  
21 great question. Number one, they're certainly  
22 different claim terms. We're talking about  
23 apples and oranges here. One is an affirmative  
24 requirement of the claim that you have to have



1       this active agent formulation, active agent in  
2       the -- ultimately you're going to add it at some  
3       point into the mixture. Whereas the limitation  
4       that we were dealing with before and at the  
5       Federal Circuit was a negative claim limitation.

6               So in other words, it said you  
7       cannot have a hair coloring agent. And as it  
8       was defined, that provides a guidepost for why  
9       we look at the ultimate mixture as applied to  
10      the hair with respect to hair coloring agent as  
11      opposed to assessing the presence of the active  
12      agent and its concentration relative to the  
13      mixture before.

14             And that's compelled by the fact  
15      that the patentee with respect to hair coloring  
16      agent acted as their own lexicographer and said,  
17      hair coloring agent means -- and I don't have  
18      the exact quote in front of me so I don't want  
19      to paraphrase it or misquote it, but they  
20      described it's an ingredient that when it's in  
21      this mixture, it would cause a change to the  
22      color of the hair after it's applied.

23             So in other words, the patentee  
24      specifically spelled out how you interpret that

1 particular claim term and moored it to a later  
2 time when it's actually applied to the hair as  
3 opposed to some earlier time as L'Oreal argued  
4 and was ultimately rejected, that you could add  
5 a pin drop of color to the composition and  
6 somehow avoid the lexicography definition.

7 THE COURT: Give me a moment. I  
8 may have another question. You haven't  
9 mentioned the Borish Affidavit at D.I. 288.  
10 There's also one that the Defendants attached at  
11 Document Item No. 422, Exhibit AE at Paragraph  
12 57.

13 Doesn't that declaration from  
14 Dr. Borish unequivocally state that the mixture  
15 is the combined active agent and bleaching  
16 formulations?

17 MR. PAUNOVICH: So I will pull  
18 that up. I don't have that particular paragraph  
19 at my fingers. I believe it read in context and  
20 in all Dr. Borish's Declarations, in which there  
21 are many, four, and multiple depositions both in  
22 this matter as well as the PGRs, he made clear  
23 at all times and Olaplex has never taken the  
24 contrary position that concentration of the

1 active agent is assessed relative to the  
2 ultimate mixture.

3 And our PTAB road map tells us  
4 exactly why you do this. This is from D.I. 426,  
5 Exhibit 20 at 10. The PTAB under petitioner's  
6 rationale, L'Oreal's construction, the preferred  
7 embodiments would be excluded from claim 1's  
8 scope, a result that is rarely justified as our  
9 Federal Circuit tells us. There's no  
10 embodiment. If we interpreted the claims in the  
11 way that L'Oreal proposes, there would literally  
12 be not a single embodiment in the specification  
13 that was covered by claim 1.

14 And we will look at this next on  
15 maleic acid terms. The PTAB also expressly  
16 found that none of the related patents that  
17 L'Oreal's counsel has referred to or any of the  
18 foreign prosecution histories that have been  
19 cited to them required a construction that was  
20 any different than the one compelled and well  
21 supported by the patent specification.

22 So if we understand how  
23 concentration is calculated in the view of a  
24 person of ordinary skill in the art reading

1 these claims in the context of the spec and the  
2 construction of the active agent terms and salts  
3 thereof flow very easily from that point.

4 As we talked about earlier, we're  
5 talking about the starting material. The reason  
6 that Olaplex proposed no construction is if we  
7 understand and interpret the active  
8 concentration terms in the way that they're  
9 proposing, then it's just a simple look at,  
10 well, what's your starting ingredient. And in  
11 this case, there's no dispute whatsoever about  
12 what the starting ingredients are. L'Oreal uses  
13 maleic acid. We see it on their labels. We see  
14 it in their marketing. We see it in their  
15 tutorial videos like we looked at earlier.

16 L'Oreal by contrast for these  
17 terms wants to imply or import the dipstick  
18 method where you put the probe into the  
19 Thanksgiving gravy and you're hoping to assess  
20 it at some point in the future to see if there  
21 is an active agent still there, and we think  
22 that that construction simply should not be  
23 applied.

24 And our PTAB in the same PGR

1 denial explained exactly that. L'Oreal's  
2 suggestion is that the active agent phrase  
3 includes only the free acid to the exclusion of  
4 any salt, particularly after the free acid is  
5 added to a bleaching mixture. That's the exact  
6 same argument we're seeing here today and they  
7 rejected it expressly.

8 And what they found was, and this  
9 is in the context of the '954 patent, that in  
10 the '954 when it says the active agent is maleic  
11 acid, it refers to that active ingredient as  
12 added to the active agent formulation in order  
13 to form the mixture. And they were clear, this  
14 interpretation does not as L'Oreal suggests  
15 exclude the formation of maleic acid salts after  
16 the free acid is mixed with a bleaching  
17 formulation.

18 In fact, they found that to be  
19 consistent with the specification and pointed  
20 out, they said, well, when we look at the  
21 specification it defines carboxylic acids of  
22 which maleic acid is the type, and this  
23 definition includes both the free acid and the  
24 salts. And that fact undercuts L'Oreal's

1 proposed construction there as well as today  
2 because their construction would exclude the  
3 formation of these ionic compositions or the  
4 salts which is exactly how Example 3 occurs.

5 If we look at that portion of the  
6 spec, it's very clear. "Carboxylic acid" as  
7 used in here -- this is in the '419  
8 specification, a slightly different column and  
9 line numbers. It's at Column 4, Lines 26  
10 through 28. "Carboxylic acid" in here refers to  
11 the group COOH. Unless specified otherwise, the  
12 term carboxylic acid embraces both the free acid  
13 and the carboxylate salt.

14 Now, L'Oreal goes through a lot of  
15 linguistic gymnastics in their responsive brief  
16 and we see it in their demonstratives here today  
17 about, well, what about this qualifier unless  
18 specified otherwise. That argument frankly  
19 falls flat. And here is why: If we look at the  
20 '954 patent, it talks about wherein the active  
21 agent is maleic acid. Our specification makes  
22 clear for that patent since it's referring to a  
23 carboxylic acid that it embraces both the free  
24 acid and the salt.

1 With respect to the '419 patent,  
2 it's different. It doesn't recite maleic acid.  
3 It illustrates a structure. So in that  
4 instance, the patentee Olaplex re -- it  
5 illustrated the structure and then it said or  
6 salts. They claim that this is some sort of  
7 exception and it's created indefiniteness  
8 problems, but it's a simple application directly  
9 from how the patentee described how it was going  
10 to use these terms.

11 And with respect to the '419  
12 patent and its use of an illustrated structure,  
13 we know that that's also not limiting to the  
14 claim in any way, to an ionic substance or  
15 otherwise. The Sumitomo and the Pfizer v.  
16 Ranbaxy cases which we cited in our responsive  
17 brief tell us that when you have an illustrated  
18 structure unless there's something specific in  
19 the specification that says you're going to  
20 limit it to this, it covers more than that. It  
21 would embrace multiple things.

22 We don't have to take either the  
23 PTAB's word for it or Olaplex's word for it or  
24 proposal here. We asked Dr. Freeman. This is

1 L'Oreal's expert in this case. He's the one who  
2 offered the contrary declarations for these  
3 proceedings. We asked him about that disclosure  
4 in the specification and he was clear, a person  
5 of ordinary skill in the art would understand  
6 carboxylic acid as it was used to include both  
7 the protonated form, that is, the nonionic free  
8 acid form as well as the charged carboxylate  
9 salt with an appropriate counter ion.

10 This is at D.I. 460, Exhibit 1,  
11 Page 170, Line 4 through Page 171, Line 5. Just  
12 to be sure, we asked him, well, isn't this --  
13 continuing on 171, Lines 6 through 11. Isn't  
14 maleic acid a carboxylic acid? And he waffles  
15 at first and then he says it expressly, maleic  
16 acid is a specific carboxylic acid. The  
17 specification of the patent tells us that when  
18 you use those words, it embraces both the acid  
19 and the salt.

20 Now that we say how the  
21 specification has applied the carboxylic acids  
22 and how that would apply to maleic acid and how  
23 a person of skill in the art would interpret  
24 that not to be limited as L'Oreal suggested, the



1       only other arguments that L'Oreal raises, and  
2       I'm going to reserve some of this for rebuttal,  
3       is a prosecution disclaimer.

4               And what we know from our Federal  
5       Circuit law is that you have to have a clear and  
6       unmistakable disclaimer in the view of a person  
7       of ordinary skill in the art, and you have to  
8       show it by clear and convincing evidence. It's  
9       not a preponderance. If you have multiple  
10      reasonable interpretations of the claim language  
11      that would not result in the disclaimer that a  
12      Defendant is advancing, then no disclaimer can  
13      be found.

14              But L'Oreal has a second problem.  
15      All of the evidence that they're pointing to are  
16      in these foreign applications. And we'll look  
17      at them. We're not concerned about them or  
18      trying to run and hide. But the reality is our  
19      courts are universal in saying that if you're  
20      going to look at this evidence from foreign  
21      prosecution, you look at it very cautiously,  
22      because for a very important reason, the laws  
23      and procedures in other jurisdictions are  
24      different.

1                   So whereas in one jurisdiction  
2                   when you're applying for a patent, it may be  
3                   that you have to narrow the claims or claim it a  
4                   different way or use different language, you may  
5                   not have to do that in another. And generally  
6                   speaking, as our Federal Circuit has told us,  
7                   this type of evidence, this foreign prosecution  
8                   evidence, is irrelevant to claim construction as  
9                   a result of those differences in foreign laws.

10                  For example, if we look at it in  
11                  the U.S., if a patentee gets a one-year grace  
12                  period for a prior publication of its own art or  
13                  prior use and it won't be treated as prior art  
14                  under 102(a) or 102(b) post-EIA, so in this case  
15                  we have and everything that L'Oreal has pointed  
16                  to is a different patent family that is not  
17                  prior art here in the U.S. because of these  
18                  exceptions in the U.S. Whereas when we look at  
19                  most other, if not all other jurisdictions,  
20                  these exceptions don't apply.

21                  You don't get the one-year grace  
22                  period. So it's commonplace not just in this  
23                  case but to have a situation where patentees  
24                  when they're patenteeing domestically and

1 abroad, that they have to contend with their own  
2 art. And what that often means is sometimes  
3 they use different claim language. Sometimes  
4 they narrow their claims in different  
5 jurisdictions. Sometimes maybe they seek the  
6 narrower invention first and file a continuation  
7 and continue to seek the broader limitations or  
8 claims later.

9 None of these strategies result in  
10 a disclaimer. You would have to find a clear  
11 and unmistakable disclaimer by clear and  
12 convincing evidence. In fact, in the U.S. a  
13 disclaimer typically only happens when you're  
14 dealing with an unmistakable narrowing of the  
15 exact same claim language into directly related  
16 applications, like a parent or child situation.

17 And so it is here, the PTAB again  
18 provides us with our road map. We're going back  
19 to D.I. 426, Exhibit 20 at 11. And what the  
20 PTAB considered is some of the very same  
21 evidence that L'Oreal is bringing before this  
22 Court here today. And it looked closely at  
23 those disclosures. They pressed these arguments  
24 there as well. They said, well, we've looked at

1 it. And to the extent that these claims or  
2 statements indicated a distinction between a  
3 free acid and its salt, we can reconcile it,  
4 simply meaning that the maleic acid is the form  
5 of the agent when added in the mixture. Just  
6 like we talked about earlier with the  
7 concentration term. And that interpretation in  
8 their view is more consistent with the  
9 disclosure in the patent.

10 Briefly and I will reserve the  
11 rest on this particular foreign prosecution  
12 piece for rebuttal, when we look at every one of  
13 those pieces of evidence that L'Oreal has cited  
14 to, it's all this commonplace situation that  
15 patentees face all the time.

16 Olaplex had an earlier patent  
17 family. It's not familially related to the  
18 asserted patents here. They're different  
19 families. That's the WO/768 patent. When we  
20 look at that, it has a very different claim  
21 scope and coverage.

22 We can look, for example, at claim  
23 1. This is Demonstrative Slide 38, D.I. 421,  
24 Exhibit T at 50. This is claim 1 of WO/768.

1       What it's talking about is nothing for treating  
2       hair. It's got a binding agent with four  
3       reactive moieties, A, B, C and D. It also has  
4       an R linker. All of these items with specific  
5       charges that are opposing one another, it must  
6       be able to covalently bind free thiol groups.  
7       This invention that Olaplex had to contend with  
8       abroad is a far cry from the invention that  
9       we're talking about in the asserted patents.

10               We can see this when we take a  
11       look at one of the examples. This is D.I. 421,  
12       Exhibit X. It was an Israeli patent  
13       application. This is one of the pieces of a  
14       foreign filing evidence that L'Oreal brought to  
15       the PTAB's attention and raised these exact same  
16       arguments. And D1 in the context of this  
17       prosecution was that WO/768. And if we look at  
18       it closely, what's actually being said by  
19       Olaplex, the first paragraph they're simply  
20       describing what WO/768 is.

21               They say, well, it's ionic  
22       compounds. You got A, B, C and D reactive  
23       moieties capable of reacting with free thiol  
24       groups, containing one or more charges. You've

1 got this R linker that contains two or more  
2 charges. The charges are opposite one another.  
3 It says, a person of ordinary skill in the art  
4 reading D1 would have selected agents which  
5 contain at least two ionic reactive moieties  
6 that are bound to an ionic linker R.

7 In other words, somebody who reads  
8 that when they're analyzing inventive step,  
9 which is not the same thing as obviousness, it's  
10 a different standard in all of these countries  
11 but it's similar, they're not going to be  
12 motivated and not taught to do anything other  
13 than select one of these complex compounds that  
14 have multiple moieties, an R linker, et cetera.

15 And they go on to say in the  
16 second paragraph, nothing in D1 however would  
17 have taught, suggested or otherwise motivated  
18 that skilled person to select or modify D1's  
19 binding agents to be nonionic compounds such as  
20 maleic acid.

21 Now, the PTAB looked at this and  
22 they said, here is this Israeli application,  
23 D.I. 426, Exhibit 20 at 11 and 12. He said,  
24 well, the statement that L'Oreal is referring to

1 again here in the prosecution of that Israeli  
2 application appears to indicate that a  
3 disclosure in the prior art of salts does not  
4 suggest substituting for the free acid itself.  
5 We're not persuaded on this record. But this  
6 statement disclaims an interpretation where  
7 maleic acid dissociates to form a salt  
8 especially when mixed with an alkaline bleaching  
9 formulation. And we saw earlier I highlighted  
10 how they reconciled that distinction.

11 The important point here is when  
12 we look at this closely, what's being said,  
13 nowhere does Olaplex invoke specific claim  
14 language within the foreign patent claim or even  
15 a particular claim for that matter. Nowhere  
16 does Olaplex say nonionic maleic acid must be  
17 present in the mixture that's applied to the  
18 hair to the exclusion of salts.

19 Nowhere does Olaplex say our  
20 claims don't cover salts. Nowhere does Olaplex  
21 say anything about its product. They're simply  
22 talking about D1, describing it and saying, a  
23 person of skill in the art is going to choose  
24 D1. And just as a reminder in the PTAB, and I'm

1       sure this will be raised by L'Oreal, we fully  
2       acknowledge that there are different standards  
3       that are used in the PTAB. They're not  
4       necessarily binding, but they can be highly  
5       persuasive.

6               And what's important here in  
7       denying institution of review of the '954, the  
8       PTAB was considering a much lower standard than  
9       we have to deal with here today. They had to  
10      find simply that it's more likely than not that  
11      there would be this disclaimer to compel this  
12      interpretation. They rejected that.

13             L'Oreal has a burden of clear and  
14      convincing evidence before you here today, and  
15      we respectfully submit that the disclosures that  
16      they're pointing to simply cannot, do not rise  
17      to the clear and unmistakable disclaimer that's  
18      required to be showed by clear and convincing  
19      evidence.

20             Brief summary, all the other  
21      excerpts that they cite to, there's many, many  
22      exhibits. We've identified them and I won't  
23      read them into the record here. I think it  
24      would be duplicative of what we just talked



1 about. Our Demonstrative 41, they cite to all  
2 sorts of other prosecution filings, and they  
3 say, well, these also compel that conclusion.  
4 With minor differences, they essentially are the  
5 exact same thing. They're contending with  
6 WO/768 and they describe WO/768 in exactly the  
7 same way. There's no statements that would rise  
8 to the level of a disclaimer.

9 Some of the evidence that they  
10 recite in their brief aren't even statements by  
11 Olaplex. They're office actions. They are  
12 foreign Patent Offices saying something. We  
13 don't adopt it. We don't say anything about it.  
14 That's never sufficient to rise to the level of  
15 disclaimer. For example, Exhibit BA and BB of  
16 D.I. 421.

17 Other evidence like Exhibit W of  
18 that same D.I. is in the foreign language, so we  
19 don't even know what is said there. But we're  
20 pretty confident since we've been consistent  
21 about this, that there's no there there.  
22 There's no difference from what we've dealt with  
23 before.

24 Very last point on salts because

1 we don't have any additional slides on it, as we  
2 explained earlier, the active agent can be a  
3 salt of maleic acid before being added to the  
4 formulation or mixture, so it can be like a  
5 powderized form of maleic acid. But this term  
6 importantly, it's not even in dispute in this  
7 case for infringement or validity.

8 We know what's in the accused  
9 products. There's no prior art dispute that  
10 we're aware of from the invalidity contentions  
11 about where something may or may not be a salt.  
12 Everybody is looking at this in the context of  
13 do you or don't you have maleic acid. And once  
14 the Court resolves the question of is it  
15 assessed relative to the mixture versus at some  
16 indeterminate time, the rest follows.

17 In any event, the '419 patent, if  
18 we look at all of the evidence and lots of  
19 slides that L'Oreal presents on this issue, it's  
20 all focused on the words simple salts, simple  
21 salts. When we look in every one of these  
22 foreign filed prosecutions, it's referring to  
23 simple salts.

24 Whatever problems L'Oreal

1 perceives in the definition of simple salts in  
2 our specification or in the claims of a foreign  
3 filing, that's a problem for another day and  
4 another patent, because our claims talk about  
5 salts period. And L'Oreal understands full well  
6 what a salt is.

7 So here is D.I. 460, Exhibit 1 at  
8 Column 167, Lines 19 through 25. So we deposed  
9 Dr. Freeman a couple of weeks ago after we saw  
10 the declaration. They understand what salts  
11 mean. Everybody understands what salts mean.  
12 It's simply a compound that's formed from the  
13 reaction of an acid and a base. So he says  
14 that's his definition, and we actually find a  
15 definition of that in his declaration as well.

16 The point of contention from  
17 L'Oreal's perspective seems to be on this simple  
18 salts, but that's not what is in the claim. And  
19 the last point on that I would simply make is  
20 the fact that all of these other foreign filings  
21 with maybe the exception of one include the  
22 simple salts language and then contending that  
23 there's some statement about it, we think that  
24 further demonstrates why there's no disclaimer

1 with relation to these foreign prosecutions.

2 They're talking about different claim language.

3 To the extent that there's any  
4 ambiguity between simple salts and what a salt  
5 is, that's a problem for those patents, not for  
6 these. With that unless Your Honor has any  
7 questions, I will turn it over to our opposing  
8 counsel. Thank you.

9 MR. PALYS: Your Honor, I will be  
10 talking through these three terms for a bit. I  
11 don't know if you want to have a break or it's  
12 up to --

13 THE COURT: Unless our court  
14 reporter -- Ms. Carroll, do you need a break?

15 COURT REPORTER: No, I'm fine.

16 THE COURT: All right. I'm ready  
17 to go.

18 MR. PALYS: Okay. So Slide 12, as  
19 Her Honor realizes, we're going to be talking  
20 about three terms collectively. From our  
21 perspective, we think it makes sense to start  
22 off with the maleic acid term and then I'll turn  
23 to the indefiniteness of the salts thereof and  
24 maleic acid or salts thereof language and then

1 finish with the mixture concentration language.

2 Before I dive in, I just want to  
3 make a couple of points to make sure that I  
4 don't mix this when I get to my arguments about  
5 Olaplex's presentation. I think I heard him say  
6 that the maleic acid in claim 1 is different  
7 than the maleic acid that's recited in the '954  
8 patent, claim 1. If I'm wrong, I'd like to have  
9 clarification.

10 I understand his argument was  
11 saying that in claim 11 in the '954 patent that  
12 includes salts, but in the '419 it doesn't. If  
13 that's the case, I'm looking at their  
14 constructions right here which all have the same  
15 construction. Now, I'm confused. So maybe that  
16 can be a sense of clarification we can have  
17 later or I just wanted to point that out. And  
18 if that's the case, we have serious 112 issues  
19 that we have to go to.

20 The other point was, Mr. Paunovich  
21 was referring to WO/768. That's not WO/986.  
22 Slide 5, they maybe were unintentionally  
23 misleading in their papers. They were saying,  
24 if you read the brief, they were referring to

1 '768. That's a prior art reference that they  
2 were trying to distinguish from the  
3 specifications. I see you nodding your head so  
4 I think the Court's got it.

5 I just want to make sure that's  
6 absolutely clear, the '768 is not in this patent  
7 family because it's the prior art that's being  
8 applied against that. So any notion that that  
9 '768 is different from what we have in the '419  
10 or '954 doesn't go to the question of whether we  
11 consider the foreign prior art.

12 THE COURT: Okay.

13 MR. PALYS: So Page 12. The other  
14 point, I keep hearing this gravy analogy. We're  
15 not talking about gravy here. In fact, Olaplex  
16 made a really big deal about the uniqueness of  
17 their invention, that no one really thought  
18 about maleic acid and using it in bleaching  
19 formulations, and certainly making an analogy to  
20 gravy just doesn't seem to fit.

21 So as I mentioned, here on the  
22 Slide 12 are the constructions. Let me just  
23 start right off, the point of Defendants'  
24 construction. There's arguments that Olaplex

1 raised here and they raised it in their papers  
2 that Defendants are trying to add limitations to  
3 these claims. Frankly from the discussion I  
4 even heard today and as I march through the  
5 claim language and the intrinsic record and what  
6 one of ordinary skill knows, the import of our  
7 construction is simply we are making explicit  
8 what is implicit.

9 In fact, I don't think I've seen  
10 anything where Olaplex has ever denied that that  
11 structure you see in claim 1 of the '419 and you  
12 see it here on Slide 12, that is a free acid,  
13 that is the nonionic and science says so. And  
14 we're going to walk through that. We've got  
15 evidence on that literature in expert testimony,  
16 so there should be no dispute.

17 So this notion that if Her Honor  
18 is leaning against the language that we're  
19 trying to put in the claim, the only thing that  
20 we're trying to have the Court understand and we  
21 think it needs to be expressed in her order or  
22 recommendation at least, is that that's nonionic  
23 if you lean for us. If you disagree with us,  
24 we're asking that that's expressed as well.

1                   We can't walk out of here with a  
2           plain meaning and just say it's plain meaning.  
3           As Mr. Paunovich noted earlier for other terms,  
4           we will be having this discussion in front of a  
5           jury which we do not want to do, so there is a  
6           dispute here. And by Olaplex not agreeing that  
7           that's the nonionic structure, they are  
8           implicitly telling the Court, the public, that  
9           that includes the ionic forms and I'm going to  
10          walk through and explain why that just doesn't  
11          hold for the intrinsic record and the science.

12                   So let's move on to Slide 13. So  
13          we start with the language of the claims. We've  
14          heard a lot of references to L'Oreal's products.  
15          And again, they're trying to bring in  
16          infringement into this proceeding, but we all  
17          know and I know the Court considers this, we're  
18          doing claim construction and we stick to what  
19          the patent is about and we start with the  
20          language of the claims.

21                   And here we are, the claim could  
22          not be much more clearer. There's the  
23          structure. It says the active agent that has  
24          this formula, and from Olaplex's submissions in



1 its joint claim construction statement, you've  
2 seen the papers, I don't think there's a dispute  
3 because they used this same structure for all of  
4 the uses of the definition of maleic acid.

5 Make no mistake about it, Your  
6 Honor, that's nonionic. That's the free acid.  
7 That's maleic acid. When we move from the claim  
8 language -- and by the way, just to make a point  
9 in the claim language, nowhere in the claims  
10 does it say anything about an ion or an ionic  
11 species or an ionic compound maleic acid. You  
12 don't see that there.

13 When you go to the specification,  
14 Slide 14, you can see that's entirely consistent  
15 with the claim language. This is Column 9,  
16 Lines 6 through 20 of the '419 patent and you  
17 will see this cite a lot today. Here is the  
18 only place you see that structure. And in  
19 particular, this is where the specification  
20 itself is calling out the active agent.

21 It says it has the following  
22 structures and it has the same maleic acid in  
23 it. Just like the claim, it has alternatively a  
24 salt, in this case a simple salt and we will

1 talk about that in a little bit. So Slide 15,  
2 you can see if you put that description from  
3 Column 9, Lines 6 through 20 next to claim 1 of  
4 the '419 patent, they nearly track each other.  
5 We couldn't be much more clearer when we're  
6 talking about the active agent, there's maleic  
7 acid and there's a distinction just like in the  
8 claims separating out from a salt or salts  
9 thereof in terms of the description, a type of  
10 salt, a simple salt.

11 So Slide 16, let's talk about what  
12 one of ordinary skill in the art would  
13 understand when you see that structure. It is a  
14 neutral charge. It's a nonionic structure. We  
15 have literature on this. We have expert  
16 testimony on this. In fact, we have citations  
17 to their experts in saying this is maleic acid,  
18 so there should be no dispute, what you see in  
19 claim 1 and what you see in the party's  
20 construction when you see that structure, it's  
21 not ionic.

22 So Slide 17. So what is an ion?  
23 This ionic compound, we're talking about ions.  
24 What is that? An ion is simply an atom or a

1 molecule that has an electrical charge. As I  
2 mentioned before, the maleic acid that was in  
3 claim 1 is neutral. It's not an ion. And what  
4 happens when a molecule goes through an  
5 ionization, it splits up into ions.

6 We try to illustrate this here on  
7 Slide 17. We have cites to Dr. Freeman's  
8 discussion about this. In this case with H<sub>2</sub>O,  
9 it splits up into two ions. You can see the  
10 positive charge cation and the negative charge  
11 anion. Those are not the same thing as the  
12 molecule that wasn't ionized. Those are ionic  
13 compounds there.

14 So the next slide, when we're  
15 talking about maleic acid and we talk about  
16 ionic compounds, they have different structures,  
17 and we show this on Slide 18. They have  
18 different properties. They're different  
19 compounds, and you don't have to take my word  
20 for it. We implore the Court to look through  
21 the record.

22 In fact, we asked Dr. Borish  
23 painstakingly to go through this earlier this  
24 year not even for claim construction on what

1 hydro maleate was and maleate is. We have  
2 literature. We have Dr. Freeman. There should  
3 be no dispute that these are different  
4 compounds. And scientifically at a very high  
5 level if you want to even contemplate the  
6 differences between these two compounds, maleic  
7 acid is known as a protonated compound.

8 And what that means is that if you  
9 look on the left it has these two hydrogens that  
10 are covalently bonded to oxygen. We tried to  
11 circle it for Her Honor there in red and blue.  
12 Was there a difference? When you go to hydrogen  
13 maleate, that's sometimes referred to as mono  
14 deprotonated or single deprotonated. It means  
15 the molecule doesn't have one of those hydrogens  
16 and we circled that in red. And also, you can  
17 see the charge there, the negative charge.

18 And when you go to a maleate,  
19 that's a double deprotonated. Meaning, two  
20 hydrogen atoms are gone. So if you hear the  
21 words protonated, deprotonated, hopefully that  
22 gives you some insight of what we're talking  
23 about. These compounds look similar. When you  
24 look at them from afar, they kind of look the

1 same but they're not, absolutely not.

2 Scientifically, they're not. And one of  
3 ordinary skill in the art would certainly know  
4 that. Let me make a point here, that even  
5 Dr. Borish confirmed this, Dr. Freeman has  
6 confirmed this and the literature confirmed it.

7 If you go to Slide 19, now Olaplex  
8 brought up this -- and I'm glad they did. They  
9 brought up this section, Column 4, Lines 26  
10 through 28 in the patent and I would like to  
11 spend some time talking about that. Here the  
12 specification couldn't be more clear. The point  
13 of this slide is there was some discussion and I  
14 guess some argument that the use of the word  
15 free acid, why are we using free acid, no one  
16 knows what free acid is, which we find kind of  
17 interesting because their own patent uses the  
18 word free acid. One of ordinary skill in the  
19 art would understand that.

20 In the context of this patent,  
21 this citation here is making absolutely clear a  
22 free acid is different from a salt. It's saying  
23 that right there. Now, in the context of the  
24 full sentence when it says unless specified

1 otherwise, the term carboxylic acid embraces  
2 both the free acid and the salt, the point here  
3 is there's your free acid. It is different from  
4 anything that would be a salt.

5 When you look at the claim again,  
6 it says here is maleic acid or salts thereof,  
7 that's the free acid. That's why we're  
8 referring to it as a free acid. If Her Honor  
9 wants to ditch the term free acid to make it  
10 clear, I think at the very least -- so go back  
11 to Slide 21 for a second -- is nonionic. That's  
12 the key term.

13 So back to Slide 20, now I want to  
14 touch on another point that Mr. Paunovich raised  
15 and he was trying to make a big deal about this  
16 Column 4. And he's saying, this specified  
17 otherwise really doesn't mean anything. It  
18 means a lot because what that Column 4 language  
19 was saying is unless specified otherwise, it  
20 covers xylic acid and embraces both the free  
21 acid and the salt.

22 Well, here in Column 9, Lines 6  
23 through 20, the specification is absolutely  
24 specifying otherwise. It's saying exactly what

1 the claim is saying, you have a free maleic acid  
2 here or a salt. So when it says acid in this  
3 context with maleic acid, they're not the same.  
4 It's specifying otherwise. It is different.

5 THE COURT: Would L'Oreal's  
6 proposal to add free acid and nonionic  
7 limitations to the disputed term effectively  
8 read the subsequent or salts thereof limitations  
9 out of claim 1?

10 MR. PALYS: Out of claim 1 of the  
11 '419 patent?

12 THE COURT: Yes.

13 MR. PALYS: No, we think it is  
14 what it is. You have free acid just like you  
15 see in the specification. It's actually very  
16 consistent with what the claim language says.  
17 It says you can have maleic acid. And again, I  
18 know you had to use the word adds. We're just  
19 trying to say what it is. But if it's  
20 interpreted as it should be, the nonionic form  
21 of free acid, it's entirely consistent with the  
22 claim.

23 The claim says you have in our  
24 view the free nonionic acid or a salt. That's

1 completely different, and it's actually  
2 consistent with the language of the  
3 specification and it's entirely consistent with  
4 the language of the other portions of the  
5 specification, and that's what's claimed.

6 So Slide 21, I'll just bring up  
7 this nonionic point. Hopefully, the Court is  
8 understanding our position. Just to be clear,  
9 when you see that structure in claim 1 and it's  
10 in the parties' construction, that is not hydro  
11 maleate. That's an ion, as I showed you in the  
12 previous slide, and that's not maleate.

13 And again, they're not formally  
14 saying -- they're trying to hide behind a plain  
15 meaning. They will just leave us with a plain  
16 meaning term. If you disagree or even if you  
17 agree with us because we think it's consistent  
18 with the plain meaning, but it is the nonionic  
19 form and has to be expressly shown so we're not  
20 fighting over it later. It's not the ionic  
21 compounds. And by them disagreeing with that  
22 it's not limited to ionic, they're essentially  
23 saying that it includes these ionic forms.

24 THE COURT: Some time was spent by



1 Mr. Paunovich pointing out how these  
2 constructions were rejected in the PTAB. It  
3 appears that the PTAB rejected L'Oreal's  
4 position, and they said it was a decision not to  
5 institute it at D.I. 420. It seems that the  
6 PTAB -- and you may disagree with the way I'm  
7 phrasing this -- concluded that the disputed  
8 term that we're talking about should not be  
9 limited to include only free acid to the  
10 exclusion of the salt because this would  
11 improperly exclude preferred embodiments.

12 Could you address that and you can  
13 address the other issues that were raised with  
14 respect to how the PTAB's constructions differ  
15 with the construction that you're proposing?

16 MR. PALYS: I will, Your Honor.  
17 I'll touch on it for this term and I will touch  
18 on it when we get to the mixture claim. At a  
19 high level, first off, this raises my confusion  
20 to what I heard earlier today. That decision,  
21 first of all, they represented it as an  
22 established ruling. It's an institution --

23 THE COURT: Understood.

24 MR. PALYS: Okay. As long as you

1 understand that.

2 THE COURT: But it's still out  
3 there and it's in the exhibits. It's something  
4 that I've looked at and it's something among all  
5 the things that I will look at.

6 MR. PALYS: And we want you to.  
7 That's our point. It is part of the intrinsic  
8 record and it should be considered and we're not  
9 saying not to. Having said that, they're saying  
10 that maleic acid itself in the '954 patent would  
11 include a salt. Now, I'm baffled. I think we  
12 have serious 112 issues. That brings me back to  
13 that point, well, they're pursuing the same  
14 construction for across the board. Then we look  
15 at the '419 which has the alternative salt form.  
16 This is something that on the fly I can say,  
17 it's just confusing.

18 But to get to the PTAB point, I  
19 think the Court can understand the PTAB record  
20 before was different than we have here. We have  
21 more evidence. We have more arguments and more  
22 exhibits and things we're going to point out.  
23 The standard is different and I know the Court  
24 appreciates that.

1 I think what the Board was getting  
2 at was talking about specifically to the maleic  
3 acid or its salt. Our construction here for the  
4 maleic acid term is saying that term on its own  
5 when we see that structure, and I think the  
6 parties agree from their JCC submissions, is  
7 that structure and that means the free acid.

8 In fact, I think if you look at  
9 the PTAB's position, they called it free acid  
10 too. So while they refer to maleic acid and  
11 maybe in that context of the '954, not that we  
12 would agree with it which we don't, we think the  
13 intrinsic evidence and the understanding of one  
14 of ordinary skill in the art that we've  
15 presented in this case as before Her Honor  
16 should take that into account. Yes, take in  
17 account the PTAB, but we think it causes more  
18 confusion, but in some sense it supports our  
19 position.

20 So let's go to Slide 22. So I  
21 mentioned that obviously the intrinsic record in  
22 our view, the claims, specification and the  
23 knowledge of one of ordinary skill in the art of  
24 what maleic acid is in that structure, it cannot

1 be confused with an ionic structure. That would  
2 be scientifically wrong. It's not there.

3 We know this was coming because  
4 the four office actions were being highlighted  
5 earlier, but Olaplex's representations abroad  
6 are so relevant here, Your Honor. And there's  
7 nothing wrong with this Court addressing it.  
8 Olaplex is trying to have this Court turn their  
9 head, they don't want to look at the foreign  
10 files for procedural issues. Oh, don't look at  
11 what we said because it happened overseas.

12 Well, those representations as we  
13 pointed out, and we'll get into them ad nauseam  
14 today, had nothing to do with foreign laws. I  
15 know Mr. Paunovich tried to raise this issue  
16 that, oh, the strategies involved when there's  
17 an absolute bar. That has nothing to do with  
18 the representation when you're distinguishing  
19 the reference for any reason.

20 Strategy does not come into play  
21 when foreign laws are being applied when like  
22 Olaplex says, our maleic acid in our application  
23 means X; that's a straight admission, if you  
24 will, representation about the very same

1 technical terms at issue. But the Federal  
2 Circuit was pretty clear here. And on Page 22,  
3 we have a Gillette case, and again this is all  
4 in our papers, that a blatant admission like  
5 this from a Defendant, in this case would be the  
6 EPO, that clearly supports the court's holding  
7 construing the term.

8 So if you go to claim 21, we have  
9 other cases that have been cited. So here in  
10 the Starhome case, again we asked the court,  
11 view these representations with caution,  
12 absolutely. There's nothing wrong with Her  
13 Honor doing that. But when you do that, you'll  
14 see that it's entirely relevant and it's  
15 entirely consistent with positions that  
16 Defendants are putting forth with respect to  
17 maleic acid and entirely inconsistent with what  
18 Olaplex is doing.

19 I will make a mention about the  
20 Caterpillar case that they cite. If you go to  
21 their slides, we won't put it up here, the quote  
22 that you saw on their slide was actually the  
23 quote from Caterpillar and it was really  
24 reframed in three different ways. It won't read

1       that way, and they left out some important  
2       points on that case's cite.

3               I believe it was Page 1116 of the  
4       Caterpillar case where the actual quote comes  
5       from. So I will bring it up. It's on the slide  
6       for Her Honor. You can see there's the actual  
7       statement where it says, no authority is cited  
8       for the proposition that instructions, the  
9       foreign counsel in this case -- there was a  
10      letter between U.S. counsel and foreign counsel  
11      that was in play but also representations to the  
12      German Patent Office.

13             They should be considered in the  
14      very legal procedure requirements for obtaining  
15      a protection in a foreign country might render  
16      consideration of certain types of  
17      representations inappropriate, but that's fine.  
18      But the court said, there's ample such authority  
19      decisions of other courts in one such matter  
20      comprised relative, as we see here, must be  
21      considered. So the point here with the case  
22      law, Your Honor, is there's nothing wrong with  
23      Her Honor considering this.

24             Another final point on this, they

1 raised --

2 THE COURT: Doesn't that also tie  
3 into the claims are the same or virtually the  
4 same?

5 MR. PALYS: That's a very  
6 important point because what the Federal Circuit  
7 is saying is if it's relevant -- if we are  
8 talking about different -- we have to show a  
9 link between what's there, and the '419 patent.  
10 And I think there was more than enough evidence.  
11 We have the same claims, the same terms. It has  
12 nothing to do with a foreign law or legal issue.

13 And the last point I want to make  
14 is we're not talking about disclaimer. They're  
15 misunderstanding the position. We never said  
16 that what they say in Israel is a disclaimer  
17 here. It's relevant evidence that should be  
18 applied. The point here is that the intrinsic  
19 record alone, the evidence that we put forth is  
20 very clear and very strong. They haven't even  
21 disputed that that structure is the nonionic  
22 form. That supports it.

23 These foreign representations,  
24 that absolutely shows what their representations

1 to the public, mind you, that should be taken  
2 into account when we're looking at what they  
3 said. And I would like to walk through this and  
4 show you what they said.

5 So on Slide 25, we'll start in  
6 Singapore. Again, you see the '768 in this case  
7 was a prior art reference, D7. That's not  
8 WO/986. That's an Olaplex document that was  
9 applied as prior art. Olaplex is saying down  
10 below, again this is at D.I. 461 at 4, that's  
11 our brief citing to this exhibit.

12 What Olaplex is saying here is  
13 that nothing in that reference that would have  
14 taught a motivated skilled person to modify the  
15 bonding agents in that reference so they're  
16 comparing the bonding agent, which by the way  
17 they refer to them as ionic compounds, to be  
18 nonionic compounds such as maleic acid. Just  
19 take a step back. I kind of know that there's a  
20 lot there, but the last part is pretty clear.  
21 They're calling maleic acid nonionic, and this  
22 wasn't before the PTAB, Your Honor.

23 So the next slide, to be clear  
24 this is the claim that they had pursued in



1 Singapore. Very similar. There's the active  
2 agent. There's the maleic acid they're  
3 referring to. They call it nonionic. We  
4 shouldn't let Olaplex have the Court turn its  
5 head or even the public for that matter from  
6 this blatant admission. It's there. But it  
7 doesn't stop there.

8 So Slide 27, now we have New  
9 Zealand. Here's the claim, very similar. You  
10 can see on Slide 26 where we're citing in the  
11 New Zealand Patent Office where it explains what  
12 they had amended. And there's the claim that  
13 you can see, active agent is the same maleic  
14 acid we have here.

15 So the next slide, Slide 28. You  
16 can see they're applying the '768 patent and  
17 then Slide 29. This is what they say, very  
18 similar. The binding agents disclosed in '768  
19 are ionic compounds. Well, if they weren't  
20 distinguishing that by calling the maleic acid  
21 that's in the claims nonionic, are they going to  
22 tell the New Zealand Patent Office that what  
23 they said wasn't true? I'm not sure. But the  
24 point here is this also wasn't before the Patent

1 Office and the PTAB.

2 If you go to Slide 30, again I  
3 mentioned earlier the Israeli Patent Office. So  
4 the claims that were identical, they said the  
5 same thing. The presently claimed agent, maleic  
6 acid, they're talking about that and  
7 distinguishing that between ionic compounds.

8 Here they're calling again the  
9 nonionic compounds such as maleic acid. And  
10 just to be clear, Slide 31 shows that claim  
11 that's identical to the '954 patent. One more,  
12 Slide 32. In Canada, over and over and over  
13 Olaplex is making representations that their  
14 active agents are nonionic compounds, and it's  
15 the same maleic acid.

16 And keep in mind, all of these  
17 national stage applications stem from the same  
18 application that tracks the '926 virtually and  
19 all come from the same '709 patent. To say that  
20 these are not relevant should not be considered.  
21 We think it's leading the Court to error.

22 Let's go to Slide 33. So I'll  
23 wrap up on this maleic acid term and address  
24 some of Olaplex's positions that they put in

1       their papers. Now, I've already touched on the  
2       PTAB's established ruling. We know that they're  
3       not -- they're accusing Defendants of adding  
4       limitations of the claims. I think I addressed  
5       that. We're not. In fact, if you look, there's  
6       silence on the position. They're trying to add  
7       ionic compounds to what maleic acid is.

8               As to foreign prosecution involves  
9       different specification, that's wrong.  
10       Different claims, that's wrong; and laws,  
11       irrelevant, because they're not. The  
12       representations have nothing to do with foreign  
13       patent law. And their argument that we  
14       were trying -- they didn't disclaim maleic acid  
15       in this foreign Patent Office representations,  
16       again it's not a disclaimer. They're relevant  
17       representations that this Court should consider.

18              So in the end we think, again when  
19       you just look at the claim, maleic acid should  
20       be interpreted and we ask the Court in her  
21       decision to make it very clear that that is the  
22       nonionic free acid form of maleic acid. So I  
23       would like to turn to indefiniteness next or  
24       salts thereof.

1                   So we're on Slide 35. They didn't  
2                   talk about much about salts in their  
3                   presentation, and they certainly didn't write  
4                   about it in their papers. And this is a topic  
5                   that the Defendants have been chasing for a long  
6                   time now. We still have not heard what they  
7                   understand their own patent to be, what is a  
8                   salt to maleic acid, how that applies to many  
9                   things, like it's relationship to its own  
10                  construction here on maleic acid which we're  
11                  going to touch on; its representation that its  
12                  product isn't covered by the '419 patent.

13                  A lot of these issues all come to  
14                  a head and the time is now. We're finally here  
15                  with claim construction and it's the right venue  
16                  to talk about this. They just don't want to, so  
17                  we ask the Court let's have this discussion,  
18                  let's get this out. But when you look at what's  
19                  there in the claims and you look at the  
20                  positions, what the intrinsic record shows, the  
21                  claims of the '419 patent, they're indefinite,  
22                  at least because we have two points here.

23                  The salts thereof in claim 1, it  
24                  has to encompass simple salts, and I'm going to

1 explain what that means. We are not defining  
2 salts thereof to be simple salts. That's  
3 confusion that they're trying to introduce here.  
4 When you see the intrinsic record and you see  
5 the specification, the proper understanding of  
6 whatever a salt is in that claim is broad, has  
7 to include the simple salts. And when you have  
8 that, you'll see there's no known meaning of  
9 simple salts. There's plenty of evidence  
10 establishing that. It renders that claim  
11 indefinite.

12 In Olaplex's position on its  
13 maleic acid, this idea that it can include  
14 nonionic forms, also introduces indefiniteness  
15 on both the salts thereof and maleic acid term,  
16 and I'll explain that. And even if you want to  
17 look to the extent that maleic acid isn't  
18 indefinite, we think that there's clear  
19 disclaimer here about what they said about the  
20 salts in the claims.

21 And to the extent maleic acid in  
22 the '954 patent includes salts, like we said we  
23 think it would render the claims indefinite. So  
24 let me walk through these with Her Honor. So

1 the next slide. I think the Court is quite  
2 aware of the standard under Nautilus. I won't  
3 belabor the point, but here it is on Slide 36;  
4 but the key point here is a person of ordinary  
5 skill in the art has to be informed of  
6 reasonable certainty about the scope of the  
7 invention and its claims.

8 When you read Defendants' briefing  
9 and you look at the evidence, you'll see that  
10 that's just not the case here when it comes to  
11 the maleic acid or salts thereof language. So  
12 Slide 37, again with the claims, what does the  
13 claims say. It says the active agent has the  
14 formula, maleic acid, free form, nonionic form  
15 or salts thereof. That's pretty clear. Active  
16 agent can be either one of those.

17 If you go to Slide 38, you'll see  
18 what does the specification say about salt.  
19 What is a salt? Olaplex keeps pointing to  
20 L'Oreal, look what we can do to find  
21 infringement against L'Oreal. What they're not  
22 telling you is -- it's their patent. What is a  
23 salt? What do they understand a salt to be?  
24 It's not how that applies and how you find

1 something for infringement. We're talking about  
2 claim construction here, and we still haven't  
3 had that answer.

4 When you go to the specification,  
5 you follow the proper process for claim  
6 construction. You'll see they only use the word  
7 salt five times. Here's four of them. It does  
8 so generally. We talked about the one in Column  
9 4. The other ones are talking about  
10 thioglycolic acid, excipients, viscosity  
11 modifying agents. All of these citations are on  
12 Slide 38 for Her Honor.

13 So Slide 39, the fifth place where  
14 it mentions the word salt is the exact same  
15 place in Column 9, Lines 6 through 20 that track  
16 the language of the claim. You can see it  
17 again. The active agent has one of these  
18 structures. There's maleic acid. And what does  
19 it say, or is a simple salt. This is where  
20 simple salt comes in. It's the only time simple  
21 salt comes into the specification.

22 If you go to Slide 40, again  
23 compare them next to each other. We saw this  
24 earlier. Tracking that language in Column 9, 6

1 through 20 tracks the language in claim 1, very  
2 closely, what's the difference. Yes, the claim  
3 only says salts. Yes, the disclosure says  
4 simple salts. The point here is that the salt  
5 has to be interpreted just by the intrinsic  
6 record alone, has to encompass at least the  
7 simple salt.

8 If you can picture a circle and  
9 have salts there, simple salts has to be within  
10 that circle. There's no other way for it  
11 because simple salt is a type of salt and it's  
12 through their words in their own disclosure in  
13 the specification. The language of the claim  
14 shows that.

15 And this argument that they're  
16 raising like, hey, look, don't -- just take the  
17 word simple salts, they don't want to touch  
18 this. They haven't touched it in their papers.  
19 They never asked our expert about it. They want  
20 you to ignore it. But when you really look at  
21 it, it's like -- so they pursued simple salt in  
22 the foreign applications. That proves our  
23 point, that they were going after a certain type  
24 of salt. And when they say salt, it means



1 something broader.

2 In fact, simple salt I believe  
3 shows up in some of the intrinsic record, the  
4 prosecution file history and some of the claim  
5 language. So I want to make sure the Court  
6 understands that position. It's not that we're  
7 saying, oh, you got to look at simple salts  
8 being a simple salt. See the claim language.  
9 It has to at least encompass it because that's  
10 the only way that disclosure can be read.

11 And you don't even have to take my  
12 word for it even though I think the intrinsic  
13 record is pretty clear. If we go to Slide 41,  
14 we asked the inventor, this was before we even  
15 wrote a claim construction, this was way back  
16 early on in the case, we asked him and he said,  
17 in the context of the '419, the salt is a simple  
18 salt. It's clear evidence showing that even the  
19 inventor knows when we're talking about salt in  
20 the context of the patent, it has to at least  
21 include simple salt.

22 So Slide 42, why is this  
23 important, because there is no known meaning of  
24 simple salt. There's ample evidence that we

1 have put forth in expert testimony from our side  
2 and Olaplex's side and the literature no one  
3 knows what a simple salt is. The foreign Patent  
4 Offices don't know what a simple salt is when  
5 that term was being pursued.

6 Here we have on Slide 42 referring  
7 to D.I. 424 Paragraph 32 which is Dr. Freeman  
8 explaining which is the only -- by the way, the  
9 only expert testimony that's in this record  
10 right now on this issue is from the Defendants.  
11 Olaplex has submitted no rebuttal expert  
12 testimony on this issue.

13 And you can see, Dr. Freeman is  
14 making the point saying a person of ordinary  
15 skill in the art would have no idea, would not  
16 understand what a simple salt means, even as  
17 it's disclosed in the '419 patent. He hasn't  
18 seen any evidence of it that it has an  
19 established definition.

20 If you go to Slide 43, Dr. Borish  
21 was asked this as well, was it a simple salt?  
22 He said, well, look, I haven't done any  
23 research, so he kind of dodged the question. So  
24 we had to ask him, have you ever used the word?

1 I don't recall ever using the term. Honestly,  
2 no. He didn't know what a simple salt was, at  
3 least at that time when he was being deposed.

4 So Slide 44, Olaplex's other  
5 expert in the U.K. was asked the same thing or  
6 at least testified to this under oath. And he  
7 was saying, well, look, you'll see that there's  
8 no such definition of a simple salt because he  
9 went to this IUPAC Gold Book, and this is D.I.  
10 422, Exhibit AG at 336-8 through 337-7.

11 So he couldn't find a definition  
12 in the book so what did he do? Unlike what  
13 Dr. Borish did, he said, well, I did some  
14 research. I couldn't find the definition. And  
15 he didn't stop there. He said, well, I asked my  
16 colleagues and they couldn't figure it out. At  
17 the end of the day, there is no one definition.  
18 No one knows what this simple salt is. These  
19 are Olaplex's representations to its expert.

20 If we go to Slide 45, again very  
21 consistent with this lack of understanding, if  
22 you will. These Patent Offices around the world  
23 had to address this term and they found no known  
24 meaning. Here on Slide 45, you see excerpts

1 from the Australian Patent Office, the Chinese  
2 Patent Office, the Korean Patent Office all  
3 addressing this simple salt term that Olaplex  
4 was pursuing. Again, very relevant and very  
5 related applications.

6 You can see the Australian Patent  
7 Office had some very good insight here. I think  
8 that is applicable here. And they even pointed  
9 out that, look, given that a skilled artisans  
10 apply different definitions, then it is  
11 important for the phrase to be specified, so the  
12 third parties will know, like L'Oreal USA, with  
13 confidence that they're working within or  
14 outside the scope of the claims, do we infringe  
15 or not.

16 Simple salt has no accepted  
17 meaning, China. Simple salt again is not  
18 recognizable, Korea. So Slide 46, again in  
19 Japan they're saying it's a relative term but  
20 it's a term without a clear definition. So  
21 Slide 46, that's D.I. 462-1, Exhibit K at 5.  
22 And, Your Honor, if it isn't apparent, our  
23 slides try to guide you through the record for  
24 the cites.

1                   So Slide 48, in conclusion the  
2                   claims are indefinite because a person of  
3                   ordinary skill in the art would not have been  
4                   able to reasonably ascertain the scope of salts  
5                   thereof; because that salts thereof as we  
6                   mentioned, you have to follow the intrinsic  
7                   record, what the claims say and what the  
8                   specification says and it has to accomplish a  
9                   simple salt, but nobody knows what that is. And  
10                  they have no rebuttal expert testimony on this,  
11                  none. And we do. So that evidence even tips in  
12                  Defendants' favor here.

13                  They had a chance to ask  
14                  Dr. Freeman about this at his deposition and  
15                  they didn't. They chose not to. They had a  
16                  chance to address it in their papers. They  
17                  didn't. They just want to say, don't look at it  
18                  because it's not claimed. And we're saying it  
19                  should be and I think it's pretty obvious from  
20                  our positions why it should be.

21                  So in the end, we think the salts  
22                  thereof language renders the claims indefinite  
23                  as you see in the asserted patents. So there's  
24                  another reason why there's indefiniteness here.

1 You have to take this from the perspective of  
2 their positions on maleic acid. I think we  
3 start touching on these other issues that Her  
4 Honor has raised.

5 If you consider that they're  
6 saying maleic acid includes the ionic compounds  
7 like change that structure into the mono  
8 deprotonated and the double d hydro maleate  
9 like you see here on Slide 49, that introduces  
10 more indefiniteness, especially when we're  
11 talking about where the claims say maleic acid  
12 or a salt thereof, and let me explain.

13 So Slide 50. I heard  
14 Mr. Paunovich just bring this up, well, look,  
15 Dr. Freeman said he knows what a salt is. Well,  
16 yeah, there's a general understanding about what  
17 a salt is, and they don't seem to dispute that  
18 it can be a reaction between an acid and a base.

19 But the point here is that to have  
20 a salt of acid, you need an ion. You need an  
21 ionic compound to form a salt bond with another  
22 counter ion. So if you recall, Your Honor, we  
23 had that H2O image there and how they split up  
24 those ions. Well, those ions if they're going

1 to form a salt they have to form a salt with  
2 another ion, but you need an ionic compound to  
3 form that salt with that acid.

4 And here with respect to the  
5 maleic acid and hydro maleate and maleate,  
6 that's hydro maleate and maleate. If you go to  
7 Slide 51, when you take that into account, you  
8 look at their constructions and then apply it to  
9 the claims.

10 We have indefiniteness. There's  
11 this redundancy here that cannot be reconciled.  
12 So if you follow what their construction is and  
13 you apply it to what maleic acid is, you say,  
14 well, that includes hydro maleate and maleate,  
15 change the claim and make it look like this.  
16 Well, that also falls into the other category  
17 that's alternative which is a salt because you  
18 need those to form a salt.

19 Thus, a person of ordinary skill  
20 in the art looking at this would not be able to  
21 reasonably ascertain what's the scope of the  
22 claim. And again, we have expert testimony on  
23 this. They do not. Now, let's go to Slide 52.  
24 There's more issues here and we want to make

1 sure it doesn't get lost in this court because  
2 this issue has come up over and over in previous  
3 discussions and we think it's very relevant for  
4 claim construction here; and that's Olaplex's  
5 representation about its product. It's finally  
6 coming to a head.

7 They've said over and over, and I  
8 don't think this Court even disputes that they  
9 have said that their product is not covered by  
10 the '419 patent and we have a slew of citations  
11 for Her Honor to show in the record where they  
12 said this, Slide 52.

13 It's also undisputed that their  
14 product includes this active agent. It's a long  
15 word. I will say it once, bis-aminopropyl  
16 diglycol di-maleate. We're going to shorten it  
17 to di-maleate active agent, if you don't mind.

18 THE COURT: That's fine.

19 MR. PALYS: And you can see some  
20 record cites where that's true and we provided  
21 an image of that and you can see it there at the  
22 bottom of Slide 52. So Slide 53, we will start  
23 off with what is that di-maleate active agent.  
24 Well, their expert in the U.K. admitted it's a



1 salt of maleic acid, and it makes sense when you  
2 see the structure there, but it's a salt.

3 If you go to Slide 54, so  
4 Dr. Borish, now this is an important slide here  
5 because we're citing D.I. 422, Exhibit AL at 81,  
6 Lines 15 to Page 82, Line 11 and also D.I. 422,  
7 Exhibit A at 82, Lines 20 through 23. These are  
8 all Dr. Borish's testimony. We understand from  
9 papers and submissions with the Court that Her  
10 Honor has considered some of Dr. Borish's  
11 opinions on this point.

12 He testified and said, hey, look,  
13 that di-maleate active agent is not a salt in  
14 the context of the '419 patent. While he said  
15 that in the context of that question, if you go  
16 back to that language where he said this, I  
17 think it's D.I. 422, Exhibit AL 78, 9 through  
18 81, 14, you'll see in the context he couldn't  
19 explain why, nor would he.

20 We asked him why. Oh, it's the  
21 structure, he said. Well, what about the  
22 structure? No answer. Can you draw the  
23 structure for us for a salt maleic acid?  
24 Counsel stopped us. He's not drawing. Over an

1 objection, he's not going to answer that  
2 question, he's not going to draw. So he didn't  
3 really explain. He just said, oh, it's not.

4 But when it came to other things,  
5 he said, oh, that is a salt within the context  
6 of the claim, so you have to take that into  
7 account. But when you get to this language that  
8 you see on Slide 54 which happened in the same  
9 testimony, you can see that the same Dr. Borish  
10 is explaining that bis-aminopropyl diglycol  
11 di-maleate -- I said I wasn't going to repeat it  
12 and I just did -- that di-maleate active agent,  
13 is that a salt? Well, he says it's a particular  
14 type of salt. Well, what particular type of  
15 salt? Well, it's a bis-aminopropyl diglycol  
16 di-maleate. Well, describing a particular salt  
17 of a maleate, correct? Specifically, the  
18 bis-aminopropyl diglycol di-maleate.

19 But when you get down to the  
20 bottom where again to wrap it up, it says you  
21 mentioned before it's a particular type of salt.  
22 What type of salt are you referring to? And he  
23 refers to the middle portion, the  
24 bis-aminopropyl diglycol di-maleate.

1                   If you go back, Dan, to the slide  
2                   where -- yeah, that's the middle part. He keeps  
3                   leaving out that di-maleate part with salt.  
4                   Well, again a salt needs an ion to form. This  
5                   is their representation again.

6                   So go back to 55, even so and  
7                   again notwithstanding what he said in May of  
8                   2018, the bis-amino di-maleate active agent is  
9                   not a salt within the context of the '419. We  
10                  asked him a month later, well, what is a salt?  
11                  After dodging and dodging, he says, well,  
12                  anything that would be a salt. Well, if that's  
13                  the case, how can what they were talking about  
14                  their own active agent is not a salt if he says  
15                  anything can be a salt.

16                  And I will get to my point here as  
17                  we walk here, but again, we just want to point  
18                  out that on Slide 56 is again the statement  
19                  Olaplex made to the PTAB. It's a bis-amino salt  
20                  that's related to maleic acid, but it's not  
21                  maleic acid. Well, that makes sense because  
22                  maleic acid is the free acid. It's not salt,  
23                  but they're calling it a bis-amino salt.

24                  So Slide 57, Patent Offices across

1 the world are agreeing with this. Again, this  
2 is relevant evidence. You can see the structure  
3 down here on the bottom on Slide 57. It's D.I.  
4 422, Exhibit BC, Pages 6 through 7. That's the  
5 same diamaleate active agent. They're calling  
6 it a salt of maleic acid.

7 So if you go to Slide 58, same  
8 thing in China. D.I. 422, Exhibit BB at Pages  
9 10 through 13, maleic acid salts. There it is  
10 again. Even though the experts here at the  
11 Patent Offices are recognizing that this is a  
12 salt of maleic acid. So Slide 59, again even in  
13 Singapore -- well, the point in Singapore is  
14 interesting.

15 They are pursuing claims. So go  
16 to Slide 60. This is D.I. 462-1, Exhibit D.  
17 You can see the claims they're pursuing in  
18 Singapore. Well, here they did something  
19 interesting. They're saying, hey, we can have  
20 maleic acid. And if you see claim 1, they say a  
21 monomaleate salt thereof, not just a salt. This  
22 helps support our position when they say salt,  
23 it's broader and simple salts, you come in. But  
24 also in claim 2 it's interesting.

1                   You see that the active agent is  
2                   selected from the group consisting of on the  
3                   left, that's your free maleic acid right there,  
4                   and it says and salts thereof just like claim 1  
5                   of the '419. But what else is it saying? It  
6                   says, oh, but excluding and it has this long  
7                   line of compound identified di-maleate at the  
8                   end. Well, that's not the exact bis-amino  
9                   di-maleate, it's the related one, but that's  
10                  showing you that that's a type of salt of maleic  
11                  acid because it's specifically excluding it, and  
12                  this is Olaplex's representation.

13                  So go to Slide 61. So in the end  
14                  when we look at this and you start considering  
15                  what their positions that they're pursuing on  
16                  one hand and then making these representations  
17                  even about its own product, you look at their  
18                  active ingredient, their di-maleate active  
19                  ingredient, you can see that it includes a hydro  
20                  maleate. You have this same issue and it raises  
21                  more ambiguities and indefiniteness issues with  
22                  respect to their positions on maleic acid, much  
23                  less a salt of maleic acid.

24                  So just to summarize, let's go to

1 Slide 62. Claims are indefinite at least  
2 because again salts thereof, that has to  
3 encompass simple salts. I think this is very  
4 clear from the intrinsic record alone.  
5 Olaplex's maleic acid positions also introduce  
6 indefiniteness. And even if the salts thereof  
7 phrase doesn't even render the claims  
8 indefinite, we showed you where the type of  
9 disclaimers here that Olaplex makes about salts  
10 from the claim because they're saying that their  
11 product isn't covered by the '419 patent.

12 I've been talking a while but I do  
13 have one more term. Shall I press ahead?

14 THE COURT: Yes.

15 MR. PALYS: Now, I'd like to turn  
16 to the mixture concentration phrase, and we are  
17 on Slide 64. So just to start right off, you  
18 can see the constructions here, and this is an  
19 interesting discussion we're going to have.

20 Defendants' construction here with  
21 respect to the active agent in the mixture, the  
22 wherein clause, it tracks what the language  
23 says. And we think that the intrinsic record  
24 couldn't be much more clearer in what it says.

1 The active agent in the mixture, that's what it  
2 says.

3 Olaplex's construction, whether it  
4 was before the PTAB or what the PTAB said aside,  
5 is removing that language from the claim, and I  
6 will explain why, and replacing it somewhere  
7 else with this language that, oh, you know what,  
8 it's the weight of the active agent added into  
9 the active agent formulation and then it has to  
10 be relative to the total weight of this mixture.  
11 So basically, you can look at the wherein active  
12 agent that's present in the mixture, wipe that  
13 out of the claim because they don't even have  
14 that representation with their construction.

15 Defendants' construction, just to  
16 be clear, the import of it when we said that is  
17 applied to the hair, you're going to see we're  
18 not suggesting that it has to be the only thing  
19 that's applied on the hair. It's the mixture  
20 just like the claim says that is applied. So  
21 the mixture is created and it's going to be the  
22 same mixture that's applied to the hair.

23 And by the way, with respect to  
24 hair coloring agent, it's the same mixture that

1 cannot contain a hair coloring agent. So if we  
2 go to Slide 65, we can see the plain language of  
3 the claim, let's follow the claim construction  
4 process, mixing creates a mixture, applying the  
5 mixture to the hair, wherein the active agent in  
6 the mixture is at a concentration and wherein  
7 the mixture does not contain a hair coloring  
8 agent. It's all there. All with antecedent  
9 basis, straightforward.

10 That's all Defendants are trying  
11 to really convey with its construction by saying  
12 that is applied to the hair. That just reflects  
13 what Step B says. If you go to Slide 66, I  
14 don't think we've got to belabor the point. I  
15 think you understand this. You don't need this  
16 representation, but here it is.

17 Let's go to Slide 67. Now, this  
18 is important here. You've heard and you've seen  
19 Mr. Paunovich go through this method, Example 3,  
20 and you see it in their brief. They're  
21 essentially making it Dr. Freeman versus  
22 Mr. Paunovich because they don't have any expert  
23 testimony on this. So what you see in their  
24 briefing, what you heard today, what you saw on



1 a screen isn't even in the specification. It's  
2 not in the claims.

3 This is attorneys coming up with  
4 calculations and methodologies to figure out  
5 what concentration is what. And that's an  
6 important point, because we're going to get back  
7 to this, that they're saying, look, Example 3 is  
8 the only really disclosure that has something  
9 that would support their reasoning for their  
10 construction.

11 But if you go to Example 3, so  
12 Column 22 of the '419 patent, that portion of  
13 the specification, there's no discussion  
14 whatsoever about calculating a concentration or  
15 figuring out how to do it. And here is it on  
16 the screen. You can see Example 3. It's what  
17 Mr. Paunovich was walking through using  
18 attorneys' positions of how you would figure out  
19 allegedly that there would be a concentration at  
20 the end.

21 Well, without sounding  
22 disrespectful, so what. Who cares how you get  
23 or determine a concentration. That is not in  
24 the claim and certainly not in Example 3. The

1       only thing that claim says, Your Honor, is  
2       wherein the active agent in the mixture has to  
3       have a concentration.

4               There's nothing in that claim  
5       anywhere or even in Example 3 that says how do  
6       you get there or how do you want to determine  
7       it. That's an important point because they're  
8       trying to make it sound -- and that's why they  
9       say, oh, you're making gravy. Again, we're not  
10      making gravy. But everyone knows you would put  
11      this amount of ingredients together to come to a  
12      conclusion. You wouldn't put a meter in to  
13      measure it afterwards.

14             Again, it doesn't matter how you  
15      get that concentration, but again, we're not  
16      talking about gravy. What he didn't tell you is  
17      that Dr. Freeman absolutely said that you would  
18      and you could. There's many tests that you can  
19      do when you have that mixture form. You can do  
20      MMR testing and he has it in his declaration and  
21      he was asked during his -- I'm sorry, during his  
22      deposition about this. So this isn't gravy.  
23      He's trying to figure out what's in the  
24      ingredient. Again, when you look at the claims,

1 the claims don't require that.

2 What does the specification say  
3 about this limitation? You see it here on Slide  
4 67. So the '419 patent, Column 16, Lines 30 to  
5 33, just like the simple salt language, it's  
6 tracking the language of the claim. We're  
7 talking about highlighting mixture, and I'll let  
8 the Court look at it, but up above it's saying  
9 that the highlighted mixture is actually formed  
10 from this active agent plus a highlighting  
11 mixture, so the highlighting mixture includes  
12 the active agent with the bleach.

13 And it's saying here that mixture  
14 has to range in exact same amounts that you see  
15 in the claim. There's your description in the  
16 specification. It's not Example 3 because  
17 Example 3 doesn't tell you anything about, hey,  
18 you have to have this type of concentration. It  
19 just says this is one example that we use.

20 And by the way, even in their  
21 example of describing Example 3, they  
22 acknowledge that the maleic acid in that example  
23 is the free nonionic maleic acid to make that  
24 point. So it doesn't stop even there. If you

1 go to the prosecution history, Your Honor, Slide  
2 68, you start to see that's the same thing  
3 happens.

4 You kind of mentioned this before.  
5 There's that D.I. 422, Exhibit AE cite that you  
6 brought up. Yes, Dr. Borish is definitely  
7 saying that the claim, claim 1 of the '419,  
8 identifies the active agent, maleic acid again,  
9 not a hydro maleate and describes the  
10 concentration in the mixture.

11 If you go to D.I. 462-1, Exhibit  
12 V, that's Olaplex that's in a patent owner  
13 response. This is them saying, the active agent  
14 again, claim 1, maleic acid of salts thereof  
15 must be present in the mixture. You can't be  
16 much more clearer than that.

17 If you go to Slide 69, it even  
18 stems back to them doing prosecution before the  
19 PTO before this litigation even started when  
20 they did the amendment. They repeated what was  
21 there, the active agent in the mixture is  
22 present at a concentration. Again, that's D.I.  
23 422, Exhibit AA. And at D.I. 422, Exhibit AC,  
24 you can see that is Dr. Borish's PGR testimony,

1 the claim describes the active agent present in  
2 the mixture.

3 Nowhere do you see if you go to  
4 Slide 70 any discussion about this until now  
5 when we're talking about claim construction.  
6 And then they bring it up to the PTAB in the  
7 PTAB's decision. But again, they had a  
8 different record before them. They didn't have  
9 the type of testimony that we're explaining to  
10 Her Honor, and you have the opportunity to look  
11 at all of this evidence and the unrebutted  
12 testimony of Dr. Freeman.

13 Now, what happens here with  
14 Olaplex's construction when you really get to  
15 the heart of it. If this Court applies this  
16 construction, the weight of active agent adding  
17 into the active agent formulation relative to  
18 the total weight of the mixture, first of all,  
19 when you look at the claim, there's no step here  
20 about adding an active agent into a formulation,  
21 no discussion of that. It just says mixing a  
22 formulation comprising an active agent.

23 So what they're saying is now you  
24 have to go back in time and say before you even

1 start making the mixture, and the little picture  
2 of the active agent, you have to go one step  
3 above that and say now you add this maleic acid  
4 to the formulation first and then you can start  
5 doing that process of doing the mixture. But  
6 when you do it there, now you're measuring what  
7 that active agent is.

8 So when you put that into the  
9 context and look at claim 1, it says wherein the  
10 active agent in the mixture is at a  
11 concentration plain language, that is gone.  
12 They're saying, well, you got to read this claim  
13 in the context because everyone knows when you  
14 calculate or like making gravy, you have to know  
15 the ingredients beforehand. That's not what is  
16 claimed. They're asking you to rewrite the  
17 claim. It is not the public's fault what they  
18 claimed.

19 If that's what they wanted to say  
20 and if that's what they wanted, they should have  
21 put it in their claims. And that is not what is  
22 in their claims, and it's not what they even  
23 said in their testimony that I showed you. It's  
24 not what's in the specification either.

1 And again, I want to make sure  
2 that this isn't lost, their run-through on  
3 Example 3 on how you apply the method doesn't  
4 matter. It doesn't matter at the end of the  
5 day. If you're talking about infringement, and  
6 again we shouldn't be, and you heard him, he  
7 wants to bring in infringement. Well, how are  
8 you going to find out if someone has the  
9 concentration. You're not going to stick a  
10 meter in the mixture. Well, that's one way you  
11 can do it, but again it doesn't matter.

12 The claim doesn't say find out  
13 what the concentration is by doing this. It's a  
14 characteristic. It says unequivocally that  
15 mixture has to have an active agent at that  
16 specific concentration. Any rewrite of that we  
17 believe would be improper.

18 They also want to rewrite the  
19 claims. If you go to Slide 71, you can see in  
20 their arguments too, and I brought this up  
21 earlier, you can see the mention of water. And  
22 they even say it in their briefs. They're  
23 saying, first as explained above, the intrinsic  
24 record makes clear that the active agent

1 concentration is assessed by measuring its  
2 weight relative to the overall mixture before  
3 being added to the solution. Solution doesn't  
4 exist in the claims. They're trying to say an  
5 aqueous solution.

6 When you look at the claims, it  
7 doesn't say that it requires water, but they're  
8 requiring water by making these arguments. And  
9 if you look at claim 2, which isn't being  
10 asserted, it says the active agent can have a  
11 bunch of excipients. It says water. So claim 1  
12 has to be broad enough. It cannot be limited to  
13 water.

14 Mr. Paunovich even said, this is  
15 our invention when he was showing the water  
16 bottle there. It's not in the claim. That's  
17 not their invention. I think I made this point  
18 already. On Slide 72, again I want to go back  
19 to that specification. They made an argument in  
20 their brief at D.I. 423 at 7. He said, if you  
21 follow L'Oreal USA's construction, none of the  
22 embodiments described in the spec will be  
23 covered by the asserted claims. That's because  
24 they're relying on Example 3 only.



1 And I've already showed you one  
2 example. There's an embodiment right there on  
3 the screen, Your Honor, Slide 72, Column 16,  
4 Lines 30 through 33. It expressly tracks what's  
5 in the claim. And that's not described in  
6 Example 3. They're trying to deflect you to say  
7 you've got to figure it out some way. Again,  
8 there's nothing in Example 3 that shows you how  
9 you have to do the calculation. That was  
10 Olaplex's attorney doing this.

11 So Slide 73, Defendants'  
12 construction we think is completely and entirely  
13 consistent with the language of the claims and  
14 specification. It tracks it. And the claim  
15 language of the claim says what it says and the  
16 specification says what it says. And their  
17 reliance on Example 3 is just a red herring.  
18 And their construction is trying to remove  
19 limitations and add unclaimed features.

20 The last point I want to make is  
21 something Her Honor raised, the problems that  
22 are addressed by the Federal Circuit's  
23 interpretation, a construction that they pursued  
24 about hair coloring agent. As I showed you in

1 that claim, it says the mixture. It's the same  
2 mixture. It has to have a hair coloring agent.  
3 And that construction from the Federal Circuit  
4 that they pursued says you have to assess that  
5 after it's applied to the hair. And if you  
6 follow their reasoning here, there's no  
7 reconciliation that raises indefiniteness.

8 And one more point, on the Federal  
9 Circuit's decision Mr. Paunovich was trying to  
10 distinguish that by saying, oh, it's a  
11 lexicographer thing. Well, the Federal  
12 Circuit's decision, this is on Page 5 of their  
13 opinion, at the bottom it says we reject the  
14 Court's construction but they said the claims  
15 readily permit, and they go on to explain.

16 They weren't talking about  
17 lexicography. They're doing the plain language  
18 of the claims just like we are relying on the  
19 language of the claims. I know I spoke a while,  
20 Your Honor, and I will yield the podium, but  
21 unfortunately I think I will be talking next, so  
22 can we take a --

23 THE COURT: Yes, we can take a  
24 stretching break within the courtroom because I

1 do want to keep this moving. So everybody can  
2 take a brief stretching break and get your  
3 bearings --

4 MR. PALYS: Your Honor, can I use  
5 the restroom --

6 THE COURT: Actually, let's take a  
7 quick restroom break and we will come back in 10  
8 minutes or so.

9 (Brief recess.)

10 THE COURT: Okay. So before we  
11 leave these materials, there were some cases  
12 cited in Olaplex's brief from the Federal  
13 Circuit that with respect to specifically  
14 claiming chemical structures in the claim that  
15 you're not -- I think one was the Sumitomo case.  
16 I don't have them at my fingertips right now,  
17 but simply because you claim a chemical  
18 structure in the claim doesn't mean you are  
19 impermissibly and you're narrowly tied to that  
20 structure. And I pose that question with  
21 respect to your arguments on the maleic acid  
22 term. I think one was the Sumitomo case.

23 MR. PALYS: It may be. I don't  
24 think it's going to matter for my response, Your

1 Honor.

2 THE COURT: Well, they weren't  
3 addressed in the briefing.

4 MR. PALYS: This is what I will  
5 say and I apologize for not being ready for that  
6 question in particular. But I would say I would  
7 look at the facts and I think on this record  
8 what we're talking about, especially when you  
9 even contemplate what they did overseas about  
10 calling that the nonionic structure and in the  
11 context of the specification and in the context  
12 of one of ordinary skill in the art would have  
13 understood what we have here, I think that would  
14 be the guidepost here.

15 Case law shouldn't overcome what  
16 the science is telling you in this regard and  
17 what the representations in the intrinsic record  
18 and what they said in the foreign applications,  
19 but I don't know if my colleagues have any  
20 comment on that.

21 THE COURT: All right. Just for  
22 the record, the case was Sumitomo case which is  
23 887 Federal 3d at 1153 specifically at Pages  
24 1157 to 60, and Ranbaxy, 457 Federal 3d 1284 at

1 Pages 1288 to 90, and it said a claim's chemical  
2 structure encompasses any combination of  
3 enantiomers and not just the ones depicted, and  
4 that was the question posed.

5 MR. PALYS: I feel like if you  
6 want to have briefing on that, I would be happy.  
7 I know it sounds kind of odd, but to answer that  
8 specific question I feel like I want to be able  
9 to anticipate the exact context of what was said  
10 there, especially what you just read. But I  
11 would think from our perspective, I think this  
12 case is distinguishable from what we're seeing  
13 there and what they were considering when they  
14 made that statement.

15 THE COURT: Okay. Before we move  
16 on to the next term, I just want to ask  
17 Mr. Paunovich if there's any responses for items  
18 that you've raised, particularly with Mr. Palys'  
19 start-off item about what exactly is the  
20 Plaintiffs' position with respect to whether in  
21 the '954 patent it includes a salt. He  
22 expressed some confusion on that point.

23 MR. PAUNOVICH: Sure. We can  
24 start with that point first. There's no

1 confusion about what the constructions are for  
2 that matter. Olaplex's position is that there's  
3 no construction needed to active agent terms.  
4 That's what we said in our brief. That's what  
5 we said in our presentation.

6 They have turned then and said,  
7 well, you're trying to construe these and you're  
8 construing them in some strange way we don't  
9 understand. That's not the case. We think that  
10 the plain meaning is compelled very clearly by  
11 the specification. With respect to the '954  
12 patent, it recites the active agent is maleic  
13 acid.

14 And the specification tells us  
15 because that's a carboxylic acid, that that  
16 embraces expressly both the free acid and its  
17 salts even though it doesn't say the word salts  
18 in that claim. With respect to the '419 patent,  
19 it's different. It does not recite the words  
20 maleic acid as the spec says in this world where  
21 it will embrace both.

22 So in that claim instead of just  
23 relying on a structure and saying that it  
24 includes salts is just plainly stated. You've

1 got the illustrated structure and it says or  
2 salts. So the patentee basically in the spec  
3 says you can do it two ways. You can refer to  
4 it as maleic acid and it's going to cover the  
5 acid in a salt or you can illustrate the  
6 structure and say or salts. That's the only  
7 point we were making.

8 Our position is those terms do not  
9 need to be construed. And I heard counsel  
10 say -- a lot of the presentation is focused on  
11 this analysis of foreign prosecution. They  
12 said, oh, we're not arguing disclaimer, which is  
13 interesting because the standard is so high in  
14 clear and convincing evidence.

15 And I think if we look back at the  
16 brief, I wasn't able to count it, but in the  
17 PTAB as well as the briefing here, they probably  
18 used the word disclaimer a half a dozen times.  
19 That's what they're arguing that evidence for  
20 and what they're relying upon it for as a basis  
21 to construe the terms in this way.

22 The claims that they pointed to,  
23 Gillette and Starhome aren't even disclaimer  
24 cases. If you look at them closely, they have

1 nothing to do with a foreign prosecution  
2 disclaimer. The Caterpillar case that they  
3 cited to actually comes from the PGR denial  
4 decision, and it's an exact quote from Note 11  
5 of D.I. 426, Exhibit 20 of that Caterpillar case  
6 where the PTAB is saying, look, we're not going  
7 to look at this evidence. It's not really  
8 relevant.

9 And we walked through the piece of  
10 evidence that the PTAB had with the Israeli  
11 application. Review them all. We're not trying  
12 to hide from it. They all say essentially the  
13 same thing, and the PTAB is unequivocal.  
14 There's no disclaimer here. There's no there  
15 there. There's no representations that would  
16 rise to that level or force us to construe the  
17 active agent terms in a way that's inconsistent  
18 with the specification.

19 This comes back to the very simple  
20 question that we posed at the beginning, how  
21 would a person of ordinary skill in the art read  
22 these claims in the context of the spec which we  
23 are compelled to do by Phillips and in the  
24 general art. And in that context, it's whether



1 you look at it before it's added into things or  
2 at some point after.

3 Counsel said, where are we going  
4 to end up if the Court adopts Olaplex's  
5 constructions. That's a very good point because  
6 it means that this Court would be entirely on  
7 all fours and consistent with a well-reasoned  
8 opinion from the PTAB, whereas if we adopt  
9 L'Oreal's constructions we would literally flip  
10 180 and have to reject every single argument  
11 made by the PTAB in order to reach their  
12 constructions because they proposed the exact  
13 same ones.

14 Just a brief point, you asked a  
15 question regarding, well, how do we reconcile  
16 this PTAB decision with the Federal Circuit's  
17 opinion on hair coloring agent and you also  
18 raised, there was Dr. Borish's Declaration that  
19 was in connection with the 2017 PGR on the '419.  
20 I think you said D.I. 422 at Paragraph 55. So  
21 they're very easily reconciled.

22 Number one, with respect to that  
23 earlier PGR, so D.I. 422 for the '419, this issue  
24 of calculating concentration wasn't in dispute.

1 Neither party proposed its construction and  
2 that's actually where we find their expert  
3 construing and interpreting the claim in the  
4 exact same way that we did. His declaration was  
5 at D.I. 425, Exhibit A. We raised that earlier.

6 They said we have no expert  
7 testimony on this issue. That's quite the  
8 opposite. Dr. Borish testified exactly as to  
9 how you interpret concentration once we realized  
10 that they were going to invent this new dispute.  
11 That's at D.I. 288, Paragraphs 66 through 67.

12 And the PTAB provided a very clear  
13 road map rejecting each of these arguments.  
14 They said, in fact, in our Demonstrative Slide  
15 18, when they're saying this unusual  
16 construction proposed by L'Oreal, there's nobody  
17 who calculates it this way other than by its  
18 paid expert witness. So that's their new guy,  
19 new sheriff in town that says let's calculate it  
20 this way.

21 Everybody else, including L'Oreal  
22 and its previous experts and Dr. Borish, the  
23 patent examiner, the spec, calculate it another  
24 way. They have no legitimate answer to the

1 preferred embodiment point that the PTAB makes.  
2 They point to this limited disclosure on their  
3 Slide 67 and it's just simply the same claim  
4 language, which their approach is let's  
5 interpret the claims completely divorced from  
6 the specification and how a person of ordinary  
7 skill in the art would interpret this. It's  
8 just not the way you do it.

9 They say, well, it's not our  
10 problem that there's no active agent in the  
11 mixture. Well, that's wrong. There is active  
12 agent in the mixture. The question is what form  
13 is it, and this why these concentration terms  
14 and maleic terms are connected. There's active  
15 agent there, but it may be ionic or it may be a  
16 salt form once you're adding it to the active  
17 agent formulation or the bleaching mixture.

18 The last piece and I just want to  
19 say one quick minute on the salts piece. On  
20 salts, it's not an issue that's in dispute. But  
21 if Your Honor wants to construe the language  
22 that's actually in the claims, salts, we're  
23 happy to have you construe it. We'll adopt  
24 Dr. Freeman's construction.

1                   He testified. That's at D.I. 460.  
2           We showed it earlier, Exhibit 1, Page 167 Lines  
3           19 through 25. He provided a simple definition  
4           of salt. It doesn't resolve anything in this  
5           case. It's not in dispute, but that's a fine  
6           definition, where there were other examples of  
7           one of their ex-employees that's consistent with  
8           that, that we looked at earlier.

9                   It's also consistent as we pointed  
10          out in our responsive brief with the plain  
11          meaning that many courts including in this  
12          jurisdiction have applied to the word salts.  
13          That's at Pages 6 and 7 of our answering brief  
14          D.I. 460. But L'Oreal is not concerned with  
15          that. They're concerned with this simple salt.  
16          What's a simple salt? That language is not in  
17          our claims. Again, that's a problem for another  
18          day, another patent and another jurisdiction.

19                  We don't have the word simple  
20          salts, so they're essentially asking this Court  
21          to render a patent invalid on claim language  
22          that is not even in the patents that we're  
23          asserting, the claims that we're asserting. You  
24          just can't do that. This is not how it works.

1                   The last piece is just simply  
2           about all of this examination of Olaplex's  
3           products and what Patent Offices have said  
4           abroad. Again, we have different laws and  
5           procedures. We had to contend with some of our  
6           own prior art and unrelated patent family.

7                   The exceptions provided by 102(a)  
8           and (b) are not available in those  
9           jurisdictions. Whether some Patent Office in  
10          Singapore said, well, I think your active  
11          product would read on this claim or not is  
12          irrelevant to the issue here today. And I'm not  
13          going to belabor because I think it's total  
14          irrelevancy, but we're not conceding any of the  
15          points that they made regarding these statements  
16          like the U.K. expert or Dr. Borish.

17                  If you look really carefully at  
18          them, there's no such admissions, certainly not  
19          a disclaimer as they would suggest. The best  
20          case and point example of that is the U.K.  
21          testimony that they point to, which is at their  
22          Slide 53. You have their counsel in the U.K.  
23          examining our U.K. expert. And if you look at  
24          it really close, it's pretty interesting.

1 He says, okay, you had given  
2 evidence as I understood that Olaplex was a salt  
3 in maleic acid but not a simple salt. And he's  
4 asking a whole bunch of other things. Were you  
5 talking about the linker and would it have an  
6 effect, we had a longer discussion, et cetera.  
7 And maybe I should look at the longer discussion  
8 which I don't think counsel provided in the  
9 record. And he asked after this very compound  
10 statement, is this your position? Yes. Well,  
11 what's your position? There's no definitive  
12 issue that's been raised on this. And again,  
13 it's irrelevant to the considerations before us  
14 today. Unless Your Honor has any other  
15 questions, we'll move on.

16 THE COURT: No.

17 MR. PAUNOVICH: Thank you.

18 THE COURT: All right. Mr. Palys?

19 MR. PALYS: Real quick on what we  
20 just heard. One, they keep bringing up the PTAB  
21 decision. If we're really going there, why are  
22 we talking about the '419 because it's been  
23 found unpatentable by the PTAB.

24 He mentioned disclaimer again.

1 It's not clear and convincing. The actual law  
2 is clear and unmistakable. And even if that was  
3 the standard with this, we clearly met that.  
4 They mentioned about adopting a salt definition,  
5 but they still haven't told us what they think a  
6 salt is. They said, oh, use what Dr. Freeman  
7 said, or simple salt, you don't have to address  
8 it.

9 If simple salt didn't have an  
10 issue, they would have just come up here and  
11 said this is what simple salt is. They will not  
12 address this and we've been chasing this  
13 question for quite some time, and I think their  
14 answer is clear because it doesn't have a  
15 definition.

16 We need to know the scope of what  
17 salt is so we can apply the prior art and the  
18 public can too. So just punting that and  
19 ignoring what the intrinsic record shows in  
20 saying, well, we don't have to address simple  
21 salt, we're not saying -- again, that term needs  
22 to be interpreted as simple salt. It has to  
23 encompass it and I think that's clear. Unless  
24 you have any questions, I'd like to move on.

1 THE COURT: Let's move on.

2 MR. PALYS: So let's go to the  
3 mixing limitations. My goal is to get through  
4 the rest of these sections in a relatively short  
5 time frame. I want to leave some time if I can,  
6 Your Honor, for one of our younger attorneys to  
7 present on some terms. That's my goal.

8 MR. PAUNOVICH. Your Honor, I  
9 don't mean to interrupt but if we can get some  
10 clarity as to are we actually stopping at three  
11 hours, because at least by our calculation  
12 Defendants have 12 minutes left or less and we  
13 have about 25 minutes, so I don't want us to end  
14 up being short-changed on --

15 THE COURT: No, I won't  
16 short-change you. Let's see how far we get.

17 MR. PALYS: We're going to do our  
18 best to stay within that, and I will leave some  
19 time for Mr. Zeilberger.

20 THE COURT: All right.

21 MR. PALYS: So mixing limitations,  
22 so let's go right to Slide 75.

23 THE COURT: All right.

24 MR. PALYS: So there's two reasons



1        why, and it's in our briefing, we believe this  
2        limitation in claims 1 and 10 is indefinite.  
3        One, it's unclear whether the use in the claims  
4        refer to applying the mixture to the hair, and  
5        that's what you see in claim 1 or if it  
6        encompasses other uses.

7                    And the second reason is when you  
8        look at claim 10's limitation that relates to  
9        what is happening in Step A of claim 1 of the  
10       '419 patent, the same with claim 1 of the '954,  
11       there becomes a lot of confusion on what it  
12       means by having this step occurring prior to the  
13       application and mixture to the hair.

14                   So let me jump through this real  
15       quick. So for Slide 76, I will show you the  
16       claims just to put it in perspective. You can  
17       see claim 10, that's a dependent claim. And I  
18       mentioned earlier to Your Honor, claim 1 is a  
19       two-step method. The first step is that mixing  
20       step. So when you go to claim 10 and it says  
21       the mixing, that's what it's referring to.

22                   And it says claim 10 requires that  
23       that mixing occurs at the time of use and prior  
24       to application of the mixture of the hair. So

1 let's talk about the time of use. So Slide 79.  
2 If you look at specification, the specification  
3 does have a suggestion of use but it's intended  
4 to refer to the time when the mixture is applied  
5 to the hair.

6 So what is this time of use? Does  
7 it mean like when you have the formulations that  
8 you put together or is it going to be something  
9 like the specification suggests the time when  
10 that mixture is actually going to be applied to  
11 the hair. Let's go back to Slide 78. You can  
12 see Dr. Freeman addressed this. When you think  
13 about it, without more disclosure like we see in  
14 the specification, it would be unclear to a  
15 person of ordinary skill in the art how that use  
16 recited in claim 10 would have been directed to  
17 the application of the mixture of the hair since  
18 the claim also requires mixing to occur prior to  
19 the application.

20 So the point here is that when you  
21 look at what the specification explains on what  
22 use means and you put it in the context of what  
23 you see in the claims, it doesn't provide one of  
24 ordinary skill in the art the scope of what's

1 the bounds of that use. Does it really mean  
2 when it's applied to the hair? But when you  
3 look at claim 1, because again this is talking  
4 about Step A. Step A says mixing and that's  
5 what claim 10 is talking about.

6 Step B is the step for applying it  
7 to the hair, so it provides this unclarity  
8 between when you look at what the specification  
9 says about time of use and putting it into Step  
10 A when that's different from Step B.

11 Now, to the second point which  
12 is -- well, I want to point this out on Slide  
13 80. Now, Olaplex has mentioned that -- and this  
14 is showing you what Dr. Freeman had to say  
15 because he was informed what Olaplex's position  
16 was which is time of use may encompass time  
17 shortly before the mixture's applied to hair.  
18 That's the construction that they want the Court  
19 to adopt. Well, that in and of itself raises  
20 questions for construction.

21 It seemed to raise more so when  
22 you really think about. So Slide 81, what they  
23 put in their opening brief -- no, their  
24 responsive brief. They go to the specification

1 and they say, hey, look, the specification  
2 describes this 35-minute processing time. Well,  
3 when you really look at what they pointed to,  
4 that's actually talking about after it's applied  
5 to the hair. Then you wait 35 minutes to do  
6 something else, like shampoo it off. It has  
7 nothing to do about that mixing step where  
8 you're actually creating the mixture before you  
9 put it on the hair, that's one.

10 Number two, they look to that 35  
11 minutes and they call that a lengthy time  
12 period. So their point is, well, look, when the  
13 specification wanted to refer to a lengthy time  
14 period, they call it a number of 35 minutes. So  
15 by silence, everything else will be a short time  
16 period, and that's where they come up with their  
17 shortly before.

18 But my question would be simply  
19 this: What does that mean? Will one of  
20 ordinary skill in the art look at 34 minutes and  
21 59 seconds as shortly before? Where is the  
22 bounds? The scope of the claim is not clear, so  
23 we think that renders it indefinite.

24 And as to the second reason, Slide

1       82, this is more like -- I don't want to say  
2       commonsense, but look at the language of the  
3       claim it's referring to there. So claim 10, so  
4       let's go to claim 10 which is Slide 76. So  
5       claim 10 again says the mixing step. That's  
6       Step A, occurs at the time of use and prior to  
7       application of the mixture of the hair. So  
8       claim 10 is telling you that that mixing has to  
9       happen before you apply it to the hair.

10               Now, look at claim 1. Clearly  
11       Step A is happening before you apply to hair  
12       because that's Step B. So that means when you  
13       look at claim 10 with that limitation, claim 1  
14       now has to encompass something that at least  
15       covers that or that becomes superfluous.

16               So what does that mean for claim  
17       1? Is it broader? Can you have a mixing step  
18       that happens after you apply it to the hair or  
19       before the mixture is made or whatever? It  
20       doesn't make sense. If you follow the language  
21       of the claims, you come up with this issue. And  
22       Dr. Freeman points this out as well, one of  
23       ordinary skill in the art would not be able to  
24       understand the metes and bounds with reasonable

1       certainty the scope of the claims based on the  
2       language of the claims that we have here.  
3       Unless you have any other questions, I can move  
4       on.

5                       THE COURT: No other questions.

6                       MR. PAUNOVICH: Your Honor, Joe  
7       Paunovich again. On the mixing term that's in  
8       claim 1 of the '419 patent, the issue here is  
9       L'Oreal says, well, because of claim 10, mixing  
10      in claim 1 could include prior to application or  
11      after when it's in the hair and they say, well,  
12      that makes no sense. But that's a really big  
13      problem which we identified in our responsive  
14      brief and hasn't been addressed, is that the  
15      spec describes exactly that type of mixing.

16                      This is in the '419 patent  
17      specification, Column 17, Lines 31 through 41.  
18      It's talking about the application of the active  
19      agent formulation. It gives two possibilities.  
20      You can do it simultaneously with the hair  
21      coloring formulation or subsequently to the hair  
22      coloring formulation. No different for a  
23      bleaching formulation.

24                      And when you go down to the bottom

1 portion of this that's highlighted subsequent to  
2 the coloring of the hair, the active agent  
3 formulation or formulation thereof is applied to  
4 the hair. They may say it makes no sense that  
5 those formulations could mix on the hair.  
6 There's simply nothing technically or otherwise  
7 that makes that infeasible.

8 We know and see how somebody  
9 applies with a brush the bleaching formulation.  
10 They do the same thing or just squirt on the  
11 active agent formulation. They're going to mix.  
12 They're together. They're on the hair, and the  
13 spec expressly contemplates that.

14 The only apparent response that we  
15 see from L'Oreal to this is they say, well,  
16 there's this '926 patent, one of the related  
17 patents. It's a U.S. patent. It's the parent  
18 patent of these. They say, well, if we look at  
19 claim 1 and claim 11 of that patent, it's much  
20 longer claims and much longer claim language,  
21 but it says you've got the bleaching formulation  
22 and the active agent formulation and it  
23 describes applying those to hair and you've got  
24 another limitation of claim 1 that says you

1 would do those two steps simultaneously. That's  
2 perfectly consistent with this example in the  
3 spec.

4 It says you do them each  
5 separately, not as a mixed combination. You're  
6 applying them simultaneously. So it's on all  
7 fours with this example in the specification.  
8 They say, well, it doesn't make any sense to us  
9 because if we look at claim 11, that has the  
10 same language as your claim 10 of the '419, that  
11 is, that the mixture is at the time of the use  
12 and prior to the application of the hair.

13 There's absolutely nothing about  
14 those two limitations that are inconsistent when  
15 you read them closely. But in any event, even  
16 if there were, the point here, this is similar  
17 to that simple salts issue. If there's an issue  
18 between the interpretation of claim 1 and 11 of  
19 the '926, that's a problem for that patent, not  
20 for this one. We have an embodiment, although  
21 they say makes no sense, is expressly disclosed.  
22 So we think the claim 1 mixing indefiniteness  
23 argument should be rejected.

24 Turning to the next issue about at



1 time of use, the claim language is very clear.  
2 It's just a question -- as we look at claim 10,  
3 it says wherein the mixing occurs at the time of  
4 use and prior to the application of the mixture  
5 to the hair. So we know it's prior to applying  
6 to the hair. It's just a question of when  
7 before applying it to the hair.

8 And as these patents need to,  
9 again just like with the other claim terms, be  
10 read in view of the specification as a person of  
11 ordinary skill in the art, not just Joe Schmoe  
12 off the street who knows nothing about  
13 bleaching. And with the knowledge of the art,  
14 they understand that these compositions are  
15 combined and quickly applied, shortly thereafter  
16 applied to the hair because of that instability  
17 of that high alkaline pH composition along with  
18 hydrogen peroxide.

19 And we asked Dr. Freeman just a  
20 week or two ago about these issues. We're  
21 looking at this language and he was very clear.  
22 He said, well, what's being described here is  
23 you're mixing these components making a bleach  
24 formulation just before use. That's D.I. 460 at

1 Column 146, Lines 2 through 12. He says, you do  
2 that because you're trying to get consistent  
3 results with that formulation and he expands on  
4 that. This is in the same exhibit. It's D.I.  
5 460, Exhibit 1 at Column 144:23 through 145:13.  
6 He reiterates, they're going to be used to  
7 bleach hair. They're mixed together just before  
8 they are going to be used.

9 He says, the reason you do this is  
10 this would minimize the possibility that the  
11 particular formulation would change to a  
12 chemical reaction occurring outside away from  
13 having been applied to the hair, and that's  
14 entirely consistent with L'Oreal's own evidence.  
15 That's pretty unequivocal in providing context  
16 as a person of ordinary skill in the art would  
17 understand it.

18 This is a hair care textbook that  
19 they cited at D.I. 422, Exhibit AG at Page 238  
20 and it's describing how you create these  
21 oxidizing emulgents of hydrogen peroxide along  
22 with the alkalizing agent and persulfates. And  
23 it says, well, once you mix those, after 20  
24 minutes the partially decomposed hydrogen

1 peroxide has virtually no further effect.

2 So Nautilus tells us you need  
3 reasonable certainty in the eyes of a person of  
4 ordinary skill in the art. Not exact certainty,  
5 not precise, not an exact number, but just  
6 reasonable certainty. And again, it's in the  
7 eyes of a person of ordinary skill in the art.

8 Here we know it's before  
9 application of the hair and all the evidence --  
10 their expert as well as the evidence that they  
11 cited provides reasonable bounds and limits to  
12 interpret this claim. Unless Your Honor has any  
13 further questions regarding these two terms, we  
14 will see accede the floor to opposing counsel.

15 THE COURT: No further questions.  
16 Mr. Palys, do you have any further comment?

17 MR. PALYS: No, Your Honor.

18 THE COURT: Okay. Plaintiffs will  
19 represent the next term.

20 MR. BLACKBURN: Good afternoon,  
21 Your Honor.

22 THE COURT: Good afternoon.

23 MR. BLACKBURN: Matthew Blackburn  
24 and we're going to talk about bleaching

1 formulation and bleach powder if my schedule is  
2 correct. Slide 43, please. So this is the  
3 claim and you can see that the term -- and this  
4 is claim 1 of the '954 patent. And you can see  
5 that bleach powder and the developer are two  
6 components that make up the bleaching  
7 formulation, and you can see that the active  
8 agent is mixed into the bleaching formulation.  
9 That is what's applied to the hair.

10 Here's the parties' constructions.  
11 And I just want to explain briefly while this  
12 slide is up, the term alkaline pH and alkalizing  
13 agent, these were touched on during the  
14 tutorial. And on the pH scale, low numbers  
15 means something is acidic. High numbers mean  
16 something is alkaline. And the chemical that  
17 causes the pH to go up is called the alkalizing  
18 agent.

19 So what Olaplex's constructions  
20 are trying to capture is that a bleaching  
21 formulation unless it has a high enough pH even  
22 though it has an oxidant in it won't actually  
23 bleach anything. Likewise with a bleach powder,  
24 one of the critical components in the bleach

1 powder, it's got to have both the persulfate and  
2 the alkalizing agent in order to raise the pH.  
3 That's how it works. Whereas Defendants, they  
4 just say plain meaning.

5 And I think one of the real core  
6 principles of claim construction, why Your Honor  
7 is investing her valuable time in going through  
8 this exercise and having us here today is we're  
9 trying to help the jury. So you have to ask  
10 yourself would a lay juror understand what a  
11 bleaching formulation is, what its components  
12 are, what its pH would be, would they understand  
13 what a bleach powder necessarily is in this  
14 invention, and I don't think they would. That's  
15 why we have to offer them some help which is a  
16 construction.

17 Now, our constructions don't come  
18 out of thin air. As I think you've probably  
19 noticed from our argument today, we've tried to  
20 base a lot of our constructions based on what  
21 the PTAB has already done in prior proceedings.

22 You can see this is D.I. 426,  
23 Exhibit 20. And this is the decision denying  
24 institution in the one of the PGRs, and they say

1       bleach powder means a dry particulate  
2       composition comprising at least a persulfate and  
3       an alkalizing agent. That's the construction  
4       we're offering to Your Honor.

5                       And likewise, they say what  
6       bleaching formulation is and they say that it  
7       requires a sufficiently alkaline pH so that it  
8       works, so we're being consistent with the PTAB.  
9       And I think that point is really important to  
10      make. The claim construction standards that  
11      apply to this proceeding which would be Markman  
12      and Phillips are going to be different from the  
13      PTAB. The PTAB operates under the broadest  
14      reasonable construction.

15                     So if Your Honor were to adopt  
16      L'Oreal's constructions which are broader than  
17      what the PTAB has decided, you would essentially  
18      be saying that the PTAB's construction is not  
19      reasonable. I think it's important to give this  
20      decision that the PTAB rendered due weight. But  
21      your construction should be no broader than what  
22      the PTAB has construed these terms to mean.

23                     Now, let's go into some of the  
24      intrinsic evidence outside of the PTAB. We've

1 got Example 3. We keep going back to that  
2 because that's the one example that uses maleic  
3 acid as the active agent and it recites that  
4 you've got a developer and you've got a bleach  
5 powder in there, so that's consistent.

6 Now, one of the issues is do you  
7 really have to have a high pH in your bleach  
8 powder or in your bleaching formulation. So on  
9 this slide we've shown you seven different  
10 examples in the record where the art knew that  
11 if you had a pH below 9, it didn't work. It  
12 didn't actually bleach, and that bleaching was  
13 actually undertaken at the pH of 9 to 11.

14 And if you look at the record even  
15 more carefully, you're going to find there's  
16 five additional cites that we put in our  
17 briefing, so this shouldn't really be a  
18 debatable point. Now, we're going to go back to  
19 the PTAB's decision. And the reason why I want  
20 to show Slide 48 to Your Honor, I just want to  
21 prove to you that they're making the same  
22 argument to you that the PTAB already said was  
23 wrong, and they haven't explained why the PTAB  
24 got it wrong.

1                   They specifically argued that  
2           alkaline should not be part of the construction  
3           of this term, and the PTAB said that was wrong.  
4           So there's a purpose of having an alkaline pH  
5           limitation even when the bleaching powder is  
6           required to include an alkaline.

7                   So this is another argument they  
8           make. They say, well, wait a second. There's  
9           this other claim in this other application and  
10          in that claim you actually put the word alkaline  
11          to describe the mixture, so this is for the  
12          claim differentiation point. By implication  
13          they're saying therefore there's no alkaline  
14          limitation in their claims.

15                  Well, that argument was rejected  
16          by the PTAB, and there's two reasons for it.  
17          One, you can have different language that covers  
18          the exact same invention coming from the same  
19          disclosure. That happens all of the time.  
20          Second, take a look at the claim that they point  
21          you to which is claim 30 in this pending  
22          application, and compare that claim to claim 1  
23          of the '954 patent and the 419 patent. They're  
24          quite different. So to the extent that they're



1 saying, wait a second, you're going to render  
2 this alkalinity limitation to prove unnecessary,  
3 there's other language in there that  
4 differentiates the two claims.

5 And then this point I was going to  
6 make before which is Slide 50, the PTAB said,  
7 wait a second, let's take a look at what  
8 evidence L'Oreal's expert had when he was  
9 arguing that there was no requirement for  
10 alkalinity. And they say, he provides no  
11 support for those statements. That record  
12 hasn't changed.

13 And then by contrast, we have  
14 abundant evidence and that's that slide I showed  
15 you which listed 7 out of the 12 references that  
16 we have. Every bleach powder has both a  
17 persulfate and an alkalizing agent. The one  
18 piece of evidence that they cite to, they cite  
19 to a textbook that describes a cream bleach.  
20 And in that cream bleach, you have two different  
21 kinds of formulations.

22 One is made up with a peroxide  
23 which is in a cream and then the other part is  
24 this alkalizing agent, and you mix those two up

1 and you put that on the hair. And then there's  
2 a second embodiment of this cream bleach where  
3 you add an optional bleach powder and they say,  
4 aha, therefore there must not be any alkaline in  
5 the bleach powder, but the reference doesn't say  
6 any such thing.

7 And I think this is also  
8 important. If you look at D.I. 460, Exhibit 2,  
9 that's the denial of the hearing in this  
10 PGR2018-24 where they tried again to argue the  
11 same point that was rejected by the PTAB, and it  
12 was again denied. So this is not just the  
13 second bite of the apple. This is the third  
14 bite of the apple.

15 And then the final point, unless  
16 Your Honor makes more questions, they make some  
17 allusions to Dr. Borish's testimony now. He  
18 somehow undercuts this argument. And I would  
19 just counsel the Court to look at that testimony  
20 carefully. Part of the testimony is at D.I. 421  
21 which is Exhibit H at Lines 48, 49.

22 And what Dr. Borish says is  
23 potassium for oxodisulfates is the same thing as  
24 peroxodisulfate. That's all he says on those

1 pages. They never asked him ever, is it  
2 possible for bleach powder to not include  
3 alkaline? They never asked that question so  
4 there's no such testimony from Dr. Borish.  
5 Unless you've got further questions.

6 THE COURT: I don't. Thank you.

7 MR. BLACKBURN: Thank you, Your  
8 Honor.

9 MR. PALYS: Your Honor, we're  
10 going to start with bleaching formulation and  
11 shift over to bleach powder. Before I start, I  
12 want to get back to you about those cases that  
13 you identified.

14 THE COURT: Yes.

15 MR. PALYS: I think was the  
16 Sumitomo and the Ranbaxy cases.

17 THE COURT: Yes.

18 MR. PALYS: And my colleagues took  
19 the time to review those, and they confirmed to  
20 me what I told you that was accurate, that those  
21 cases are distinguishable on the facts. They  
22 didn't hold a general proposition of what you  
23 were saying.

24 THE COURT: Okay. I will take a

1 look at them again. Thank you.

2 MR. PALYS: You're welcome.

3 Starting with bleaching formulation, so I want  
4 to start real quick with the -- they mention in  
5 their tutorial, Slide 84, about alkaline pH and  
6 what you need and you need to have a pH level of  
7 9 to 11 to do bleaching. Keep in mind as I  
8 mentioned in the beginning, claims don't require  
9 any pH level.

10 So for them to say that you have  
11 to have effective bleaching, the specification  
12 doesn't describe a pH level needed to effect any  
13 type of bleaching so they have to go outside the  
14 intrinsic record to get there. And even their  
15 own slides if you look at their presentation on  
16 Slide 47, they cite to D.I. 99-1, Exhibit F to  
17 Borish Rebuttal Declaration. And in there, it  
18 even says poor bleaching effect.

19 They're trying to make this point  
20 you have good bleaching when it's 9 plus, but  
21 poor bleaching when the pH is less than 9. It's  
22 still bleaching. There's no level of bleaching.  
23 Again, it's required by the claims in the '419  
24 and the '954, so even their own documents that

1       they cite to point to that.

2                       And here it is, you can see this  
3       is Slide 47 right there on D.I. 99, poor  
4       bleaching effect results when a pH is less than  
5       9. That's still bleaching. If they're saying  
6       that now you have to have excellent bleaching or  
7       really good lift or something like that, that's  
8       in the claims, now we're going down a road that  
9       we don't want to go down.

10                    THE COURT: Taking that a step  
11       further, where is it in the intrinsic record a  
12       suggestion that acidic bleaching formulations  
13       are sufficient to bleach hair?

14                    MR. PALYS: That raises a good  
15       point. Number one, the specification is silent  
16       on that either way. So the claims have to not  
17       have a limitation on any type of pH. I think  
18       that's how that claim in the intrinsic record  
19       should be read. Number two, when you look at  
20       what they're saying is a sufficient level of  
21       alkaline, what does that mean? Is it 9 to 10?  
22       Is it 8 point something? Is it something around  
23       there? And it doesn't even get into the acidic  
24       level of it.

1                   They're just trying to basically  
2                   avoid prior art. That's why we're looking at  
3                   what they're doing for a bleach powder and  
4                   bleaching formulation. And there is evidence in  
5                   the record of acidic bleaching. That's the  
6                   DeGeorge patent reference, and I believe we cite  
7                   to that in a briefing and I will give that cite  
8                   to you or my colleagues will. There is a  
9                   reference that does disclose that you can do  
10                  bleaching at acidic levels.

11                 THE COURT: But that was mentioned  
12                 in the PTAB decision, was it not? And that  
13                 DeGeorge reference used an acidic lightening  
14                 composition only after the hair had been treated  
15                 with alkaline, did it not?

16                 MR. PALYS: That I don't know. I  
17                 would have to ask my colleagues on that one.

18                 THE COURT: So I'm just trying to  
19                 find out whether to accept your client's  
20                 position that the DeGeorge reference actually  
21                 supports the finding that an acidic composition  
22                 would effectively lighten hair in the absence of  
23                 any residual alkali from any prior treatment.

24                 MR. PALYS: I'm going to have to

1 do my homework on that one to make sure I don't  
2 misrepresent what's there, but I believe it says  
3 what it says in our brief. I will say it this  
4 way as I sit here: The point here is what's in  
5 the claim about bleaching formulation if we  
6 start off with exactly where we started in this  
7 case, so Slide 85, when we started this case  
8 they're up here saying, oh, we got to have this  
9 interpretation.

10 Right off the bat with their first  
11 PI motion they have said and their experts said  
12 everything gets its plain and ordinary meaning  
13 and, in fact, bleaching formulation was a  
14 chemical mixture that lightens hair. Never said  
15 anything about alkaline. You have to ask  
16 yourself why are they doing this now. It's  
17 because of the prior art that's before them.

18 Now, they're changing their minds  
19 and they're trying to do that. Now, you can put  
20 that aside because again, we're talking about  
21 claim construction. The motivation for doing  
22 that, okay. Now, let's do that. Let's go to  
23 the claims. The claims don't say anything, if  
24 you go to Slide 86, about what a bleaching

1 formulation is. It just says there's the  
2 bleaching formulation.

3 It doesn't explain that it has to  
4 have a certain level of pH, whether that's  
5 acidic or some level of alkaline. Again, it  
6 surely doesn't tell you what sufficient means.  
7 In the specification, if you go to Slide 87,  
8 just mentions it in general. Bleaching  
9 formulation typically needs a bleaching agent to  
10 lighten the hair. It doesn't say sufficiently  
11 alkaline pH level.

12 And when Olaplex actually wanted  
13 to say in their claims, hey, we want alkaline pH  
14 level, they did it. If we go to Slide 88,  
15 remember in the beginning I showed you the chart  
16 of the family of patents and down the bottom was  
17 that new patent '478, so this is part of that  
18 same specification. They actually put that in  
19 their claims.

20 Now, it says bleaching mixture.  
21 But make no mistake about it, we pointed this  
22 out in our briefs, bleaching mixture is  
23 bleaching formulation. They use this  
24 synonymously. And Dr. Borish himself used the



1 word mixture when he defined bleaching  
2 formulation. But here they say it, having an  
3 alkaline pH. Okay, so if that's the case then,  
4 we're going to come back and interpret claim 1  
5 of the '954 and the '419 patents having  
6 bleaching formulation to have that  
7 interpretation. We have an issue here, again  
8 because now that a child application is actually  
9 expressly saying that it has to have an alkaline  
10 pH.

11 In the end if you go to Slide 89  
12 to summarize, Olaplex started this case as plain  
13 ordinary meaning so that has to drive to  
14 Question 1, why are we here. There is no  
15 requirement in the intrinsic record anywhere  
16 that says what type of alkaline levels are  
17 needed in the claims and the disclosures.

18 The fact that they're using the  
19 sufficient alkalinity language raises  
20 indefiniteness issues in and of itself. The  
21 last point I want to make is the specification  
22 actually does use pH ranges for something else.  
23 If you go to Column 3 --

24 THE COURT: Let me catch up.

1 MR. PALYS: No, I'm sorry, Column  
2 7. We can bring it up for you. So here we're  
3 talking about formulations. And down on Column  
4 7 of the '419 patent you can see right around  
5 Line 24, to start off in Line 14, we're talking  
6 about the active agent formulations. In Line 24  
7 it says, hey, these formulations render the pH  
8 formulation neutral pH or a pH ranging from  
9 about 3 to 12. It's telling you that the active  
10 agent formulation can have a pH range. It's  
11 expressly saying that. They don't do that for a  
12 bleaching formulation. So that's the first  
13 point.

14 The second point is if we're going  
15 to look at claim 1 and start adding a pH level  
16 to bleaching formulation as Olaplex wants, then  
17 shouldn't we be doing the same with the active  
18 agent formulation and why is that not being  
19 addressed when the specification clearly shows a  
20 range.

21 Why are we picking one particular  
22 element out of the claims and saying, oh, let's  
23 add something that's not described in the  
24 specification when the actual disclosure does

1 give you that. I think that's it for bleaching  
2 formulation. Unless Your Honor has any more  
3 questions, I can shift over to bleach powder.

4 THE COURT: No questions.

5 MR. PALYS: So for this term, Your  
6 Honor knows the dispute here. They're trying to  
7 add this limitation that, look, a bleach powder  
8 is a dry particulate composition. They say i.e.  
9 powder, so they define powder here. I don't  
10 think we're going to quibble with that.

11 So the rest of their limitations  
12 really describe what a bleach is. Comprising a  
13 persulfate and an alkalizing agent, you put it  
14 together. When it boils down to it, you have to  
15 have this alkalizing agent as you heard  
16 Olaplex's counsel say. We think that the bleach  
17 powder has its plain meaning.

18 If you look at the claim term on  
19 itself, it's a powder, particulate composition  
20 that lightens hair. That's consistent with  
21 where we started in this case. Dr. Borish and  
22 them saying everything gets its plain meaning  
23 and they refer to bleaching as lightening.  
24 Nonetheless, here we are with this limitation

1       that has come into play.

2               Olaplex is really hanging their  
3       hat on what the PTAB did. And they're asking  
4       this Court, hey, just give deference to what the  
5       PTAB did. I think you know the ramifications of  
6       that. It goes full-bore and I won't to keep  
7       repeating the obvious of patentability on the  
8       '419 patent.

9               But, yes, you can consider that  
10       and, yes, there were positions that the PTAB  
11       didn't accept, but they didn't have the record  
12       that we have before you. There's expert  
13       testimony here on these points. There's  
14       evidence here and there is disclosure about the  
15       idea that you can have a bleach powder and still  
16       call it a bleach powder whether it's  
17       persulfate -- we're not going to quibble whether  
18       a bleach powder has to have a persulfate or some  
19       form of it. But you don't necessarily have to  
20       have an alkalizing agent at that time and you  
21       call it a bleach powder.

22               Now, their point is, well, you  
23       can't really do bleaching without having this  
24       alkalizing agent because you have to adjust the

1 pH to make it alkaline. That may be the case,  
2 but we have shown in our evidence literature and  
3 expert testimony that says, well, yes, you can  
4 have what's called the "bleach powder" and you  
5 can add something that's considered an  
6 alkalizing agent while you're making the  
7 bleaching formulation, and that's the point I  
8 want to make sure the Court -- it doesn't get  
9 past you.

10 It's not that you may end up using  
11 an alkalizing agent. It's bleach powder itself  
12 doesn't require that. And the reason why  
13 they're doing this is, again, it's for prior  
14 art, because if their position is that every  
15 persulfate of bleach powder, if you will,  
16 automatically includes an alkalizing agent, that  
17 means the prior art that has persulfate bleach  
18 powders automatically includes alkalizing agent.  
19 This is one of the positions that they used to  
20 try to get around certain prior art. They say,  
21 oh, the prior art does not have an alkalizing  
22 agent so, therefore, it's not a bleach powder.

23 And I'll finish with this point on  
24 this, I can't stress enough that their basis for

1 their adding an alkalizing agent is not in the  
2 claims and not in the specification. It comes  
3 from extrinsic if it comes from what they say as  
4 what one of ordinary skill in the art would  
5 understand.

6 So if that's the case, then they  
7 are representing then, well, every person of  
8 ordinary skill in the art would understand that  
9 a persulfate must have an alkalizing agent. And  
10 if that's the case, then we have to revisit what  
11 was said about these prior art references that  
12 allegedly didn't have expressly seen alkalizing  
13 agent in it, and what the PTAB said about that.

14 With that, I think I'll yield the  
15 podium to my opposing counsel here. Thank you.

16 MR. BLACKBURN: Just brief  
17 rebuttal. If you've got any questions about  
18 what Mr. Palys said, I'm happy to address any  
19 question.

20 THE COURT: You may be addressing  
21 this issue with the '478 patent that includes  
22 the language about the alkalinity and also the  
23 last point about the argument that is made by  
24 L'Oreal that bleach powder itself doesn't

1       require the alkalizing agent. Otherwise, how do  
2       you explain all of that with the prior art  
3       addressing bleach powder.

4               MR. BLACKBURN: Let's start with  
5       the related application, so Slide 88 from their  
6       slide. Again, this is a claim differentiation  
7       argument that they're trying to make and compare  
8       that claim with the claims that we're dealing  
9       with. And when you look at it carefully, you're  
10      going to start seeing lots of differences.

11             Step A talks about combining a  
12      developer with maleic acid or salts thereof.  
13      That phrase doesn't appear in any of the other  
14      claims. And then Mr. Palys keeps glossing over,  
15      well, this one says bleaching mixtures and the  
16      other one says bleaching, but that means the  
17      same thing, trust me, I know.

18             I don't know. We haven't  
19      construed that term. The literal words of this  
20      claim and the other claims are not the same. So  
21      to the extent that there is the word alkaline pH  
22      in this claim, it's still going to have a  
23      different scope from the other claims that we're  
24      dealing with, so claim differentiation can't

1 possibly affect the outcome here.

2 I think the bigger point, the  
3 point that is more commonsense, you can use  
4 different language to cover the exact same  
5 thing. And so having been through the process  
6 of getting PGR, seeing what art that they're  
7 filling up, our prosecutor is being clever and  
8 they're looking to try to come up with language  
9 that's going to address some of the art.

10 Mr. Palys made a big deal.

11 He said, well, wait a second, at  
12 the start of the case Dr. Borish said that all  
13 the bleaching formulation is something that  
14 would lighten hair. Well, at that time the only  
15 issue that was in front of us was L'Oreal's  
16 infringement. And when you look at their  
17 products and you look at their instructions,  
18 it's crystal clear that they have bleach powder,  
19 that they have developer that they're putting  
20 the additive into it and got a bleaching  
21 formulation. There was no dispute about that so  
22 there's no reason to construe the terms.

23 Then when we get into the PGR  
24 which was filed against the '954 patent in



1 January of this year, they put in that DeGeorge  
2 reference. And that DeGeorge reference, as Your  
3 Honor correctly summarized, describes an acidic  
4 peroxide formulation that's applied to hair  
5 that's been pre-alkalized. So again, there's no  
6 reference in this record that shows you can  
7 achieve bleaching without alkali.

8 Mr. Palys was very clever in how  
9 he phrased some of his discussion. There's a  
10 reference in the record and it's Ogawa, it's  
11 D.I. 421 and it's Exhibit G in there. And in  
12 that reference it does not use the phrase bleach  
13 powder. It uses the word persulfate. And in  
14 the PTAB we argued about whether or not the  
15 disclosure of persulfate by itself met the  
16 meaning of bleach powder as in our claims. And  
17 they said, no, it did not and they denied  
18 institution and they denied rehearing on that  
19 issue.

20 So now he wants Your Honor to say,  
21 well, anytime someone says persulfate, that  
22 implicitly says they've also got alkali in  
23 there. Well, that's not what the PTAB said and  
24 that's not what the record supports. We're

1       construing a specific term in this claim which  
2       is bleach powder and the intrinsic record shows  
3       that bleach powder requires both a persulfate  
4       and an alkaline. Did I answer both of your  
5       questions, Your Honor?

6                   THE COURT: You did.

7                   MR. BLACKBURN: So are we moving  
8       to breakage now?

9                   THE COURT: I think Defendants are  
10      going to take the lead on that.

11                  MR. PALYS: Joe Palys again, Your  
12      Honor. So Slide 96, please. So it's really  
13      three reasons, core reasons, with respect to the  
14      indefiniteness of the hair breakage terms, and  
15      this is the '954 patent claims 14 through 16 and  
16      claims 24 through 26. And it's really unclear  
17      what hair is used to make the comparison, and I  
18      will walk through that with Her Honor.

19                  Second, the claims really don't  
20      explain how the breakage can be quantified in  
21      comparison to levels that you see in the claim.  
22      Third, there are many tests that lead to various  
23      results. There is no one industry standard test  
24      that Olaplex is trying to say occurs out there

1 and that comes from their construction when you  
2 see -- Olaplex's proposed construction is  
3 visible broken fibers of hair upon industry  
4 standard testing.

5 The fact of the matter is there's  
6 many ways of assessing breakage, damaging hair  
7 with varying results. That's all explained in  
8 our briefs. Let me start with the first  
9 position. So Slide 98. I just want to walk  
10 through the claim first to frame this.

11 So claims 24 through 26 just like  
12 14 through 16, they depend on different claims  
13 but the point here is following a Step C and  
14 this is the '954 patent. If you remember, there  
15 were three steps and Step C is applying to the  
16 hair, so it's after that.

17 This says following that step, you  
18 have breakage of the hair is decreased by at  
19 least -- and I will stick with claim 24 -- 5  
20 percent compared to hair bleach with the  
21 bleaching formulation in the absence of the  
22 active agent. So Slide 99. So it's compared to  
23 the claims. When you look at what the claim  
24 says, the claim says you have the breakage of

1 the hair, we went through that step in claim 1,  
2 and it's compared to hair that has been treated  
3 by bleaching without the active agent.

4 When you go to the specification,  
5 what hair is that? Now, the disclosure says,  
6 well, that hair has to come from the same  
7 individual. So that's the question. But when  
8 you look at the claim and you go back to Slide  
9 98, look at what the claim says, breakage of the  
10 hair. So now the hair. We're talking about the  
11 hair in claim 1.

12 So let's use me as an example  
13 because I have long locks. So I go through the  
14 process of claim 1, that's my hair. And now the  
15 claim is saying the breakage in my hair has to  
16 be decreased by 5 percent compared to hair  
17 bleached with bleaching formulation in the  
18 absence of the active agent. Is that my hair?  
19 Is that someone else's hair? Where is this  
20 comparison coming from?

21 So back to Slide 99. The  
22 specification is saying, look, in one example  
23 you can be the same individual. But again, the  
24 claim isn't so limiting. The claim just says

1 hair, so it's not very clear on what the scope  
2 is. How can one of ordinary skill in the art  
3 ascertain the scope to determine whether they  
4 meet the claim or whether they went in the  
5 confines of the claim when it's not very clear  
6 on its face with respect to the claim language,  
7 especially in the context of the specification.

8 And when we really think about  
9 this, Your Honor, let's use the example again  
10 Olaplex is asserting against salon services so  
11 let's put that in that perspective. You go into  
12 a salon to -- to meet their claim limitations,  
13 go to the step of the '954 patent, so you go  
14 through the steps to apply it to the hair and it  
15 has all the characteristics that they named, the  
16 exact concentration of the active agent in the  
17 mixture, et cetera.

18 So go to Slide 98. So when you  
19 get to these claims, it says okay, now, we got  
20 done with that. So I just had my hair treated.  
21 Now, the breakage in my hair has to be decreased  
22 by 5 percent compared to if it's the same  
23 individual's hair, which I believe is their  
24 position, does that mean when I went into my

1 treatment in the context of this patent, if  
2 they're applying it to salon services that what  
3 part of my hair has been treated, and then for  
4 some reason we have to go through a process of  
5 bleaching my hair without the active agent and  
6 then do this grooming test that they want, that  
7 they say is the industry standard test and then  
8 look at the fibers and compare it and decide if  
9 there's a 5 percent difference or is it someone  
10 else's hair? Is it your hair versus mine when  
11 we get there?

12 So if you follow along with their  
13 logic, meaning what the specification is  
14 describing, it doesn't make sense. Unless  
15 they're saying that the claim is limited to  
16 swatch testing and then are they coming from the  
17 same individual which is what their examples  
18 described, but they're trying to apply it to  
19 salon services.

20 With respect to the second  
21 limitation or the second reason for  
22 indefiniteness, so Slide 101, so the  
23 specification provides no guidance on how  
24 breakage can be quantified. What is this

1 breakage? Keep in mind, their patent talks  
2 about bonds being broken at a molecular level,  
3 and they talked about other types of damage that  
4 can occur on the hair. And what Olaplex is  
5 trying to do with their presentation, they're  
6 trying to say breakage is different from damage  
7 and you saw that in your presentations.

8                   You can get frizziness. You can  
9 have broken hair shafts and all of these things  
10 and I believe their position is that breakage  
11 means literally the shafts of the hair are  
12 breaking, but that's not what's in the  
13 specification. It provides no guise on what  
14 that means. But what the patent does describe  
15 is, well, you can have some broken bonds. It  
16 says you can have these molecular broken bonds  
17 so does that mean breakage? That's one level of  
18 inquiry that we have with respect to the  
19 indefiniteness.

20                   The second one is there's no  
21 guidance on how you quantify that 5 percent, 10  
22 percent or 15 percent that's in the claims. How  
23 do you come to that determination of level of  
24 breakage when you get past all of the other

1 issues that I've explained with these claims.

2 In fact, we have testimony of  
3 Dr. Freeman on Slide 102 on this point. A  
4 person of ordinary skill in the art would not  
5 know what the claims intended for the hair  
6 breakage to be compared, and he provides support  
7 to several exhibits. You can see that here on  
8 Slide 102. In fact, in Slide 103 he explained  
9 there's literature explaining there's many, many  
10 ways that you can assess hair damage, different  
11 types of tests.

12 They have this grooming test that  
13 they're saying is industry standard and we're  
14 going to talk about that in a second. There's  
15 all testing. There's mechanical testing. You  
16 can have a visual inspection of the hair, but  
17 realistically in the patent they say under the  
18 example they say visibly broken or visibly  
19 damaged, I'm paraphrasing what was in there.

20 But visibly, they're assuming that  
21 can even mean -- I'm just running my hands  
22 through the hair as a person of ordinary skill  
23 in the art would. Visible can also mean images  
24 that were created from SEM testing, electronic



1       microscope so you can visibly look at the shafts  
2       and see the damage which is what happens in this  
3       industry, and there's evidence of that and  
4       expert testimony on that. And we submitted all  
5       of this as exhibits.

6               So the point here is that you can  
7       have different results based on the test to use.  
8       I may look at a piece of hair and say, that  
9       looks fine. But when I look under a tensile  
10      test or something, I might say, well, that's  
11      broken. That's a different type of damage. And  
12      in the Federal Circuit we cited to case law in  
13      our brief saying that when you have these types  
14      of variances, it leans toward indefiniteness  
15      like we have here.

16             Your Honor, I'm going to talk  
17      about some confidential information. So what  
18      we're going to do here -- are we clear? Is  
19      everyone good?

20             THE COURT: Is --

21             MR. PALYS: Okay. We were being  
22      careful so we wouldn't have to close the  
23      courtroom. So why don't we go straight to Slide  
24      105. I want to address some of the points that

1 Olaplex raised in its briefing. First they  
2 said, well, you know what, look what L'Oreal  
3 did. L'Oreal did this type of testing, and  
4 that's really setting up the industry standard,  
5 how can they say this is not the type of testing  
6 you do.

7 Then they also said, well, there  
8 was an industry standard and it was a grooming  
9 test by evidence. Two points on that; they  
10 cropped one piece of evidence out of hundreds  
11 and hundreds of pages of information that we  
12 submitted to them to say, well, look what they  
13 did for a test. But in reality when you look  
14 at -- let's go to Slide 108. We submitted many  
15 documents.

16 First of all, to the extent this  
17 is relevant what L'Oreal did after the  
18 contemporaneous time of what these patents are,  
19 they're not even the same time frame,  
20 internally, inside behind their walls even is  
21 relevant to what one of ordinary skill in the  
22 art would understand with respect to these  
23 claims. Putting that aside, what they pointed  
24 to you ignores the amount of evidence that we

1 put forth to them.

2 There was many, many tests and  
3 this is just an example on Slide 108. They  
4 pointed to a particular number. I think it's  
5 the 770 test, one of these tests. The number  
6 that they pointed to -- the document that they  
7 have is not this document. They said, look,  
8 they did this test and it's grooming so they  
9 know that's the way to do it.

10 Now, there were tensile testing  
11 and there was all of those types of other things  
12 that were performed, so to the extent this Court  
13 is even going to consider what a third party has  
14 done after the relevant dates of this patent  
15 internally as evidence of what is an industry  
16 standard or what should be done, we think you  
17 should look at the entire record of what was  
18 submitted to Her Honor and you can see that  
19 that's just not really accurate.

20 The second point, and I'll back up  
21 and this will be the last point I want to make,  
22 they also said, well, we use TRI and they did  
23 the industry standard test. So we did a little  
24 research on TRI, and if you go to their website,

1 they don't say that that grooming test is the  
2 standard. In fact, the top part of this slide,  
3 106, which is in our briefing comes from -- I  
4 just noticed the cites are not showing up, but  
5 we have the cites for the record on our slides.  
6 They never said that that was the industry  
7 standard.

8 When they use the word industry  
9 standard, they're talking about something else,  
10 tensile testing, MTT. So in their brief they're  
11 trying to make this representation that, look,  
12 there's a grooming test; that's the industry  
13 standard. So their construction when it says,  
14 well, we want to do visible inspection based on  
15 industry standard testing and everyone knows  
16 that the industry standard testing is this  
17 grooming thing because L'Oreal did it, and I  
18 already explained that, and that's the industry  
19 standard from TRI. That's just not accurate.

20 The fact of the matter is there is  
21 expert testimony and literature that shows that  
22 there is no one standard and there's various  
23 types of results that can come from the  
24 different types of assessments of hair. And

1 then going backwards, the language of the claims  
2 clearly shows that the scope of what those  
3 claims are could not be reasonably ascertained  
4 by one of ordinary skill in the art, and that's  
5 supported by the evidence and expert testimony.  
6 Thank you.

7 THE COURT: Okay.

8 MR. BLACKBURN: So breakage in  
9 hair. Now, Mr. Pals was up here talking for a  
10 long time and one of the things I did not hear  
11 him give Your Honor was a cite to the record of  
12 where there's any method that will provide you a  
13 percentage decrease in hair breakage. Among all  
14 of the tests L'Oreal conducted of all of the  
15 tests they cite, he did not identify a single  
16 test that would give you the parameters actually  
17 required in our claim.

18 And if Your Honor looks through  
19 the record, there's only one test that provides  
20 that number, and that's this TRI repeat grooming  
21 test that's in the record at D.I. 426, Exhibit  
22 28, and that is an article from 2010 which  
23 predates the patent.

24 Now, they -- and again, I think

1       it's important to understand the context. We  
2       have these claims. They've litigated this issue  
3       with the PTAB. And they said, hey, these claims  
4       are invalid. And the PTAB said, no, we don't  
5       think these claims are invalid. We think these  
6       claims are going to survive the PGR. So they're  
7       faced with the prospect of having to litigate  
8       these claims in front of Your Honor.

9                   And they've got in their files  
10       evidence from the testing that they did using  
11       the industry standard test that shows they  
12       infringe these claims. And they come to the  
13       Court and say, somebody of ordinary skill in the  
14       art would know what these claims mean. Come on,  
15       that can't be a credible position.

16                   Now, we tried to limit the number  
17       of words that got construed in the term and we  
18       say that visibly broken fibers upon industry  
19       standard testing. The reason why we chose that  
20       language is because he's correct that there  
21       isn't an expressed teaching in our application  
22       that used the TRI method to determine hair  
23       breakage.

24                   But fortunately for us, there's no

1 requirement to do so in the case law. And we  
2 cited the case in our opening brief and we  
3 talked about it in our answering brief, and it  
4 was never discussed by L'Oreal. And that case  
5 is Wellman v. Eastman, 642 F.3d 1355, and that's  
6 a Federal Circuit case from 2011.

7 And what it says and it says it  
8 very clearly, is that well-known standards don't  
9 need to be repeated in your patent application.  
10 So if everybody knows how to do hair breakage  
11 testing, you don't have to teach it. And the  
12 case goes on and says something else that's also  
13 pertinent to some of the arguments that they've  
14 made.

15 They say, well, wait a second, you  
16 might get different numbers if you use Joe's  
17 hair or my hair or if you change the humidity  
18 and, therefore, you don't know if you're within  
19 the scope of the claims. Well, the Wellman case  
20 says a POSITA would know how to follow standard  
21 instructions. That's enough.

22 And if you take a look at that  
23 article, Exhibit 28 from D.I. 426, the Evans  
24 Park article, it says exactly how to do the

1 test. It says normalize the hair; it says take  
2 one tress and bleach it; take the other tress  
3 with your additive or your conditioner, bleach  
4 that too and then put it into your test, 10,000  
5 brush strokes and literally count the fibers  
6 that break after 10,000 brush strokes and just  
7 do a percentage. That's what the test says. A  
8 person of ordinary skill in the art would well  
9 know that.

10 This is just to show that the PTAB  
11 did consider this issue, D.I. 426, Exhibit 20,  
12 and they said that it was sufficient, what we  
13 described in our patent application. Here's the  
14 TRI test just so you have in the record where it  
15 is. That's a picture of Dr. Evans. He's very  
16 well-known in the testing world.

17 Mr. Palys made a big deal, well,  
18 wait a second, we did all of these tests. We  
19 did tensile testing. We did protein loss tests.  
20 And here they are. If you take a look at them,  
21 none of them actually provide the parameter  
22 that's required by the claims.

23 The claims are very specific.  
24 They say you need to have a percentage decrease



1 in the breakage when you compare bleach plus  
2 additives versus bleached hair. None of these  
3 tests do that. For example, this slide  
4 references protein loss testing. So in protein  
5 loss testing, essentially you subject the hair  
6 to the bleaching and you wait before and after  
7 and you get a number which is the difference in  
8 the weight. Well, that's not a percentage in  
9 decrease of breakage.

10 So I asked their expert, how is  
11 this relevant? And eventually after some back  
12 and forth, he said, well, I might be able to  
13 correlate protein loss to what you're claiming  
14 in your claims. Now, let's turn to Dr. Freeman.  
15 I asked him, Do you know of any test method that  
16 would give you this percentage of decrease in  
17 hair? He said, No. He said he didn't know.

18 Well, what's interesting about it  
19 is the issue was debated in the PGR. The PGR is  
20 part of the intrinsic evidence that's required  
21 for claim construction. And yet either he never  
22 asked for it or his counsel never gave him that  
23 information because he never looked at it.

24 Can we pull up D.I. 460, Exhibit 1

1 and it's Transcript 133, Lines 6 to 12. So I  
2 was sort of curious. He's telling me on the  
3 slide I just showed he didn't know how this was  
4 tested. Yet I knew it was discussed in the PGR.  
5 He should have been looking at the PGR record in  
6 connection with claim construction. He had  
7 never been given it. His opinions, I think, are  
8 diminished in their credibility in this area  
9 because he simply wasn't given sufficient  
10 information.

11 Now, let's go back to Slide 66. I  
12 think this timeline is important but I have to  
13 give a little context. So in May of 2018 is  
14 when we told the PTAB, here is the gold  
15 standard, here is how you assess this percentage  
16 of decreasing hair breakage. Here is the TRI  
17 test.

18 At that time, we didn't know what  
19 testing L'Oreal had done. We didn't know that  
20 they had actually used TRI to do the gold  
21 standard testing. We only found that out months  
22 later. So the fact that what we identified as  
23 the gold standard is actually corroborated by  
24 L'Oreal because they used the test that we said

1 was the standard. There can't be any better  
2 evidence of that.

3 They haven't shown that there's  
4 some other test that gives you different  
5 results. In fact, their expert said he didn't  
6 know of any test. Well, they had it in their  
7 file. They just didn't give him the testing  
8 that they did. Unless Your Honor has more  
9 questions, that's all I have on that.

10 THE COURT: No questions.

11 MR. BLACKBURN: Thank you.

12 MR. PALYS: Just a couple of  
13 points, Your Honor, and then I'll let  
14 Mr. Zeilberger take the podium so you can stop  
15 listening to me. I wanted to bring up something  
16 on the DeGeorge comment that you brought up. I  
17 think if you look at our D.I. 420 at 13, you can  
18 see our citations there.

19 Basically, if you look at it, it  
20 makes clear that you have a lightening  
21 composition, i.e., a bleaching composition and  
22 that's adding an acidic condition. I think  
23 regardless of whether there is any pretreatment,  
24 if you will, it's still considered a bleaching

1 composition or a lightening composition at an  
2 acidic level.

3 The last point I want to discuss,  
4 we heard the discussion of the Evans paper and I  
5 think in D.I. 462-1, Exhibit AN, we cite to this  
6 in our -- actually, it might be our opening  
7 brief. There's a critique of that. And we put  
8 that in our brief. It's in the record before  
9 they raised this Evans paper. So to the extent  
10 that Evans is the gold standard test, not  
11 everyone seemed to agree with it. It's D.I.  
12 422, Exhibit AN just to be clear.

13 And with that, I'm going to allow  
14 my colleague Mr. Zeilberger to take the stand  
15 and I will finally stop talking.

16 THE COURT: Very well.

17 MR. ZEILBERGER: Good afternoon,  
18 Your Honor.

19 THE COURT: Good afternoon.

20 MR. ZEILBERGER: Daniel Zeilberger  
21 on behalf of Defendants. May it please the  
22 Court? In the context of the '419 and '954  
23 patents, the term about is indefinite and let me  
24 explain. Turn to Slide 111, please. So it's

1 important to keep in mind how the claims of the  
2 asserted patents use the term invalid.

3 As you can see in both the '419  
4 and '954 patents, they recite essentially the  
5 exact same language; from about 0.1 percent by  
6 weight to about 50 percent by weight. And the  
7 question that these claims raised is what is the  
8 endpoint of this range. What is the lower  
9 endpoint and what is the upper endpoint. And  
10 the problem with the patents is they never  
11 provide an answer to that question.

12 So Slide 112. Now, we've  
13 excerpted here from the specification of the  
14 '419 and '954 patents, in the '419 patent Column  
15 16, Lines 26 to 36, an example -- really the  
16 only specific example where ranges are defined  
17 in the context of what's arguably a bleaching  
18 mixture and it's noted by a mix with the term  
19 about. So Olaplex didn't have to use the term  
20 about in the claims if it didn't want to.

21 And you can see that, for example,  
22 about four lines from the bottom of the excerpt,  
23 they say preferably at least 0.1 percent by  
24 weight to large amounts such as up to 50 percent

1 by weight, so the word about doesn't appear  
2 there. And to be sure, it does appear elsewhere  
3 in the specification, the word about, but they  
4 never explain what it means.

5 So Slide 113. I think this issue  
6 is really crystallized in the testimony from  
7 Olaplex's expert Dr. Borish in the PGR where he  
8 was asked, and this is Line 16 of D.I. 421,  
9 Exhibit E, Page 80, what does the word about  
10 before the 0.1 percent and the 50 percent mean  
11 to you? And he couldn't give a straight answer.  
12 He kind of waffled. He said maybe it means plus  
13 or minus 10 percent but it depends, and it's  
14 really indefinite.

15 Can you go to Slide 114, please.  
16 And in addition to the testimony from  
17 Dr. Borish, we also have testimony from  
18 Dr. Freeman that affirmatively confirms two  
19 things. One, that this plus or minus 10 percent  
20 concept doesn't show up anywhere in the  
21 specification by the patent. It's simply silent  
22 about the meaning of about.

23 And the second point is just that,  
24 the specification doesn't explain what about

1 means. Slide 115, please. So we think the  
2 facts here are very similar to the Amgen v.  
3 Chugai case from the Federal Circuit. That's  
4 927 F.2d 1200 and the cite for this section is  
5 1218, where the Federal Circuit found the term  
6 about to be indefinite in a case where there was  
7 nothing in the specification, prosecution  
8 history, prior art to indicate what about meant,  
9 and there was no evidence from the experts to do  
10 that.

11 In fact, here I think it's even a  
12 stronger case because you have nothing in the  
13 specification or prosecution history that gives  
14 any guidance. And here the expert testimony  
15 actually affirmatively confirms that the word  
16 about is indefinite.

17 So Slide 116, please. So Olaplex  
18 has really made two points in response. One,  
19 they point to a passage from Dr. Wickett, his  
20 declarations in the PGRs. He was L'Oreal's  
21 expert where he touched on this plus or minus 10  
22 percent concept, but their reliance on his  
23 testimony is misplaced.

24 There he was just saying that the

1 specification doesn't have support for that plus  
2 or minus 10 percent concept and for that reason,  
3 the specification doesn't have adequate support  
4 for the term about. And if you look at the  
5 bottom half of this Slide 116, you see that  
6 Olaplex itself actually is conceding that the  
7 term about in the context of these patents  
8 doesn't have a precise definition.

9 Now, I would like to pull up, I  
10 think this is important, Slide 73 from Olaplex's  
11 demonstratives which has three cases that I  
12 don't think showed up in any of the briefs, and  
13 I think it's important to touch on them.

14 First, the title of this slide  
15 says that Delaware has consistently held about  
16 as definite. In fact, none of these three cases  
17 held the term about to be definite. In the  
18 first case as Olaplex says, the court declined  
19 to construe the term about and declined to  
20 decide the issue.

21 In the second two cases, there  
22 weren't any indefiniteness arguments made. The  
23 second point that I think is important,  
24 specifically with respect to the Ansell case,



1       you see there kind of the excerpted part, you  
2       see the passage where the court says, I am  
3       dubious of Defendants' arguments. But if you  
4       pull up the Ansell case specifically, I think  
5       context is key here.

6                   The yellow highlight there of the  
7       Ansell case is the part that shows up in  
8       Olaplex's slide where it says, I am dubious of  
9       Defendants' arguments. But what's important is  
10      four words before that, they say on the one hand  
11      I am dubious. But if you look after that in the  
12      orange highlighting, on the other hand the  
13      Federal Circuit in considering indefiniteness  
14      challenges as to similar language has looked to  
15      guideposts in the patent informing a skilled  
16      artisan of how to measure a term of degree, and  
17      that's what's missing here. The '419 and '954  
18      patents don't give any guideposts about what the  
19      scope is of the term about, and for that reason  
20      it's indefinite. Unless Your Honor has any  
21      questions, that's all I have.

22                   THE COURT: No questions.

23                   MR. BLACKBURN: We're getting to  
24      the end, Your Honor. So we're going to go to

1 Slide 68. This is just the claim to get some  
2 context. I think as an ordinary lay juror when  
3 you say the word about, you know what it means.  
4 It means that those numerical limitations are  
5 not precise. They're not hard stops.

6 So you could have an amount of  
7 concentration of the active agent and the  
8 mixture that's a little bit below .1 or a little  
9 bit more than 50 weight percent and you would  
10 still be within the scope of the claim. And in  
11 fact, they use approximate words like about  
12 which is quite common in claim language.

13 So our construction since it has  
14 plain words that jurors can understand is that  
15 there's no need to construe it. And you saw in  
16 the Delaware cases that were just shown to Your  
17 Honor, that in the first case that's what the  
18 court did. The court basically said, I don't  
19 need to construe a term that a juror would  
20 readily understand.

21 And then the other two essentially  
22 gave it a synonym. They said about means  
23 approximately. Defendants say the term is  
24 indefinite because there's no test or standard

1 set forth in the specification for how much  
2 about varies.

3 What was interesting in the  
4 presentation and in their briefing is they don't  
5 cite to any legal precedent, any at all, binding  
6 or otherwise that says that's required. The  
7 only case that they cite that goes their way is  
8 this Amgen v. Chugai case. And when you take a  
9 look at that case, it's actually quite different  
10 from our facts.

11 And forgive me, but I will have to  
12 get into a little bit of detail about the  
13 prosecution. But the claims had a numerical  
14 limitation and it said that the specific  
15 activity had to be greater than 120,000, and the  
16 examiner found a piece of prior art that had  
17 128,000, so they modified the claim language to  
18 go and say about 160,000.

19 And in that context, the Federal  
20 Circuit was troubled because it wasn't clear  
21 whether they were still trying to capture the  
22 subject matter that they gave up because of the  
23 prior art. It wasn't clear to the court whether  
24 or not about 160,000 went all the way down to

1 128,000.

2 What the Federal Circuit was  
3 counseling prosecutors in that situation to do  
4 is not use about because it's not clear. But in  
5 this case, we have lots and lots of evidence  
6 that a person of ordinary skill in the art would  
7 understand what about means in this claim.

8 Now, Mr. Zeilberger tried to say,  
9 well, don't pay attention to Dr. Wickett. He  
10 was just talking about some other issue, but his  
11 words are his words. He said, a skilled artisan  
12 2014 would have interpreted about in this very  
13 patent to refer to amount that's plus or minus  
14 10 percent.

15 If that's true, if their expert's  
16 position is true, that's dispositive. The claim  
17 can't be indefinite. And they mentioned  
18 Dr. Borish. Here's his testimony. I don't like  
19 the yellow highlighted version, so I reproduced  
20 it here. He says in the top part that basically  
21 about means it's not necessarily exactly .1, a  
22 term of approximation. That's consistent.

23 And then he's asked by their  
24 counsel, is 10 percent below or above? And he

1 says, it depends. It's not unreasonable. But  
2 again, it's an indefinite, but it's a word of  
3 approximation, but, yeah, that's reasonable. So  
4 we've got our second person of ordinary skill in  
5 the art that says plus or minus 10 percent is  
6 okay. That's how they understand the claims.  
7 With that factual basis, there simply is no  
8 indefiniteness here.

9           These are the three cases, and we  
10 just checked very quickly and we couldn't find  
11 these claims cited in our brief and I apologize  
12 for that. But I think the main point I want to  
13 make is that in the top case, the court declined  
14 to construe about so that the lay juror would  
15 understand what it means.

16           And in the bottom two, they just  
17 said about means approximate. They didn't have  
18 a requirement for some stringent standard set  
19 forth in the specification. No case says that.  
20 And then finally, we're going to make the same  
21 point we've been making to Your Honor all day.  
22 They tried this argument several different ways  
23 with the PTAB and it was rejected again and  
24 again and again.

1                   Your Honor should take a look at  
2                   the PTAB decisions and see that they didn't have  
3                   any trouble understanding what about meant. If  
4                   you have any questions?

5                   THE COURT: No questions on this  
6                   term. Anything further, Mr. Zeilberger?

7                   MR. ZEILBERGER: Very briefly,  
8                   Your Honor. I think just the two points I want  
9                   to clarify with respect to the testimony that  
10                  was shown on the slides, one was with respect to  
11                  Dr. Wickett. I think one thing that was said  
12                  that actually didn't show up in the declaration  
13                  was in this patent, opposing counsel said that  
14                  Dr. Wickett said about means this in this  
15                  patent.

16                  If you look at the record, he  
17                  actually didn't use those terms. He just said,  
18                  generally maybe this is a meaning of what about  
19                  may mean, but in this patent that actually  
20                  doesn't show up in the specification. There's  
21                  no support for it and for that reason, the term  
22                  about doesn't have support in the specification.

23                  The other thing that I think is  
24                  notable that you didn't hear that I had brought

1 up in the opening is with respect to Dr. Borish,  
2 that he said it's an indefinite really, and his  
3 words should hold. If Olaplex's own expert  
4 thinks it's indefinite and can't stand by a  
5 particular meaning, that shows it's consistent  
6 with the Amgen case, consistent with the Ansell  
7 case that Olaplex submitted but left off the  
8 second sentence, and, Your Honor, I can give you  
9 the Westlaw cite for that. It's 2017 Westlaw  
10 1021844, since I don't think it shows up in the  
11 slide. We think the evidence here is very  
12 analogous to the Amgen case and the about term  
13 here is indefinite. Thank you.

14 THE COURT: All right. Well, I  
15 want to thank everyone for your presentations,  
16 very helpful. I will take this under  
17 consideration and I will issue the claim  
18 construction Report and Recommendation within  
19 the time I indicated in the scheduling order.

20 With that, is there anything  
21 further from the Plaintiffs?

22 MR. PAUNOVICH: No, Your Honor.

23 THE COURT: Anything further from  
24 the Defendants?

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MR. PALYS: No, Your Honor.

THE COURT: All right. We will  
stand in recess. Thank you.

(The proceedings ended at  
2:35 p.m.)



C E R T I F I C A T I O N

I, Taneha Carroll, Professional Court Reporter, certify that the foregoing is a true and accurate transcript of the foregoing proceeding.

I further certify that I am neither attorney nor counsel for, nor related to nor employed by any of the parties to the action in which this proceeding was taken; further, that I am not a relative or employee of any attorney or counsel employed in this case, nor am I financially interested in this action.

/s/Taneha Carroll  
Taneha Carroll

Professional Reporter and Notary Public